In the Supreme Court
OF THE
United States

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ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California; E. M. ROSS, Deputy Assessor of the County of Los Angeles, State of California; W. O. WELCH, Tax Collector of the County of Los Angeles, State of California; H. A. PAYNE, Auditor of the County of Los Angeles, State of California, and COUNTY OF LOS ANGELES, a body corporate and politic,

Petitioners,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY (a corporation), and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Respondents.

BRIEF FOR RESPONDENTS.

(In opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit to review decision rendered June 7, 1926, and reported in 13 F. (2d) 814, reversing unreported decision of the District Court for the Southern Division of the Southern District of California.)

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No.

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Petitioners,

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(In opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit to review decision rendered June 7, 1926, and reported in 13 F. (2d) 814, reversing unreported decision of the District Court for the Southern Division of the Southern District of California.)

STATEMENT OF THE CASE.

The respondents, hereinafter called plaintiffs, are California public service corporations, engaged in the telephone business. They brought this suit to enjoin the County of Los Angeles and several of its officers, the petitioners in this Court and the defendants below, from seizing and selling some 300,000 so-called "telephone talking sets" in satisfaction of a local tax.

The Circuit Court of Appeals directed the injunction to issue as prayed (R. pp. 93, 95), reversing the decree of the District Court. The District Court had strongly intimated that the plaintiffs were entitled to prevail on the merits (R. p. 50), but had dismissed the bill for want of jurisdiction, stating that while the court "might take jurisdiction", it was "not persuaded that it would be error not to do so", and that it believed that "the matter should be left to the Courts of the State of California" (R. p. 51).

Federal jurisdiction was invoked by the plaintiffs and sustained by the Circuit Court of Appeals under Section 24 of the Judicial Code, on the ground that the complaint presented a federal question under the Fourteenth Amendment (R. pp. 85-88). The jurisdictional amount admittedly is involved (R. pp. 4, 15). Equity jurisdiction was sustained on the ground that the plaintiffs were faced with irreparable injury, and that they had no adequate remedy at law because (1) upon payment of the tax they could recover it, if at all, only by a multiplicity of suits against the defendant county and sixteen separate municipalities for which the tax is collected; (2) no interest on the tax could be recovered; (3) it is extremely doubt-

ful whether plaintiffs, being lessees and not owners of the talking sets, are even accorded the right under the California statutes, to maintain an action to recover the tax, and (4) if such an action would lie, the plaintiffs could not recover the whole amount paid, since, under the state law, certain costs of collection could not be refunded.

The controversy arises as follows: During 1925 the plaintiffs had upwards of 300,000 telephone instruments in use in Los Angeles County, each instrument consisting of (1) a receiver, transmitter and induction coil, which the defendants call collectively a "telephone talking set"; (2) a stand, in the case of a desk telephone, or a body, in the case of a wall telephone, and (3) necessary wiring. All these parts are indispensable to the use of an instrument. The plaintiffs own the stands, bodies and wiring of the instruments involved in this case. They do not own the talking sets, but lease them from the American Telephone and Telegraph Company, a New York corporation, which does not operate in California.

Section 14 of Article XIII of the California constitution (quoted by the Circuit Court of Appeals, R. pp. 78-79) provides that telephone companies shall pay a percentage of their gross receipts (5½ per cent, under Section 3664a of the Political Code of California) as a tax for state purposes upon

> "their franchises, * * * poles, wires, * * * conduits, rights of way and other property, or any part thereof, *used* exclusively in the operation of their business"

in California, which tax

> "shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property above enumerated of such companies."

The plaintiffs duly paid their gross receipts taxes which were some $2,300,000 (R. p. 46). The defendants nevertheless levied the local tax in suit upon the leased telephone talking sets and threatened to seize and sell the sets to collect it (R. p. 11), claiming that the gross receipts tax is in lieu of local taxes on property owned by the plaintiffs and not upon property leased by them, even though used in the telephone business.

For a further statement of the facts we refer to the opinion of the Circuit Court of Appeals (R. pp. 76-78), and to the summary of the complaint under Point I in this brief. The facts alleged in the complaint are either admitted by the answer (R. pp. 24-29), or established by undisputed evidence (R. pp. 42-48).

ARGUMENT.

I.

THE COMPLAINT PRESENTS A FEDERAL QUESTION WHICH GAVE THE DISTRICT COURT JURISDICTION OVER THE CASE, EXTENDING TO ALL QUESTIONS IN IT, INCLUDING QUESTIONS OF STATE LAW (Answering Petitioners' Brief, pp. 8-12).

The substance of the complaint by paragraph numbers, omitting paragraphs I-IV (R. p. 4) and XVII-XVIII (R. p. 16), which contain usual formal allegations, and paragraphs V-VII (R. pp. 4-7), which describe the business of the plaintiffs and allege that the plaintiffs lease the talking sets and own the other parts of the instruments involved in this suit, is as follows:

8. On or about April 29, 1925, the defendant Hopkins, as county assessor, sent the American Telephone and

Telegraph Company (the owner of the talking sets) a notice, set out in the complaint (R. p. 8), demanding payment of a tax of $57,017 upon the sets. A subsequent notice (R. p. 9) of the delinquency of the tax was sent to the American Company under date of June 12, 1925 (R. pp. 7-9).

9. Under date of July 8, 1925, the assessor sent the American Company a notice in care of the two plaintiffs (R. pp. 10-11), saying that if the tax was not paid immediately he would proceed to collect it by seizing and selling as many of the talking sets as might be necessary.

10. The talking sets are operative property of the plaintiffs, that is to say, property used exclusively in their business in California. The plaintiffs duly reported their instruments, including the talking sets, to the State Board of Equalization as operative property, as provided in Section 3665b of the Political Code of California, and the assessor filed no protest against classifying them as operative property (R. pp. 11-13). The assessor should have filed such a protest if he claimed that the talking sets were non-operative property, or subject to local taxation (Pol. Code, Sec. 3666).

11. Under Section 14 of Article XIII of the state constitution, taxes upon the talking sets are entirely and exclusively for state purposes. The plaintiffs have paid, or are ready, willing and able to pay, gross receipts taxes to the state, as provided by law, and such gross receipts taxes are in lieu of all other taxes and licenses, state, county and municipal, upon the operative property of plaintiffs, including the talking sets. The pretended local tax or assessment is unlawful and void (R. pp. 13-14).

12. The laws of California contain no provision whereby the plaintiffs could pay the tax under protest and bring suit to recover it. Even if it were possible under the state law to recover the tax in an action at law, the plaintiffs could not recover interest thereon (R. p. 14).

12a. The defendants in the proceeding sought to be enjoined are acting for said county and sixteen separate municipalities named in the complaint, and if the taxes are collected, the county will forthwith distribute to each of said sixteen separate municipalities a substantial part thereof, and the plaintiffs could recover the parts of the tax so distributed, if at all, only in a multiplicity of suits (R. pp. 20-23).

13. The threatened seizure and sale of the talking sets would disrupt and paralyze the telephone service of the plaintiffs within the County of Los Angeles, to their great and irreparable injury. The consequent loss, damage and injury would greatly exceed $3000 (R. pp. 14-15).

14. The threatened seizure and sale would deprive the plaintiffs of their right to transmit messages between Los Angeles County and other places in the United States and would deprive plaintiffs of their property without due process of law, and would deny them the equal protection of the laws and is and would be in violation of the rights, privileges and immunities of the plaintiffs under the Fourteenth Amendment to the Constitution of the United States (R. p. 15).

15. If the statutes of California, under which the defendants claim to act (which statutes are enumerated in the complaint), be construed to authorize the threatened

seizure and sale, they are to that extent in violation of the said Fourteenth Amendment (R. pp. 15-16).

16. Although plaintiffs claim the tax is void, they offer to pay it if it is held valid (R. p. 16).

To the point that the complaint, alleging threatened unconstitutional action by the defendants, presents a federal question we cite the following cases, in addition to *Greene, Auditor of Kentucky, et al. v. Louisville etc. R. Co.*, 244 U. S. 499, 508, and *Raymond, Treasurer of Cook County, Illinois v. Chicago Traction Co.*, 207 U. S. 20, 35, cited by the Circuit Court of Appeals (R. pp. 85-87):

Chicago etc. R. Co. v. Kendall, Governor, et al., 266 U. S. 94, 97-98;

Wilson, County Collector of Taxes v. Illinois Southern R. Co., 263 U. S. 574, 575-576;

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445;

Keokuk etc. Bridge Co. v. Salm, County Treasurer, et al., 258 U. S. 122, 123-124;

Louisville etc. R. Co. v. Greene, Auditor, et al., 244 U. S. 522, 528.

See also:

Terrace v. Thompson, Attorney General, et al., 263 U. S. 197, 214;

Illinois Central R. Co. v. Greene, Auditor, et al., 244 U. S. 555, 559-560;

Cuyahoga Power Co. v. City of Akron, 240 U. S. 462;

Home Telephone Co. v. County of Los Angeles, 227 U. S. 278, 287;

Siler et al., Commissioners v. Louisville etc. R. Co., 213 U. S. 175, 190-191;

San Francisco National Bank v. Dodge, 197 U. S. 70, 75;

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 390-391.

In *Home Telephone Co. v. County of Los Angeles*, 227 U. S. 278, quoted and followed by the Circuit Court of Appeals (R. pp. 87-88), this Court expressly overruled the case of *Barney v. New York*, 193 U. S. 430, relied on by the petitioners (Br. pp. 9-10), and pointed out further that the case of *Memphis v. Telephone Co.*, 218 U. S. 624, also cited by the petitioners (Br. p. 9), involved only a question "of pleading and in no sense of substantive Federal power" (227 U. S. 294).

The case of *St. Joseph etc. R. Co. v. Steel*, 167 U. S. 659, the only other case cited by the petitioners (p. 11), is clearly not in point. The question there was whether a railroad bridge was subject to local taxation under the laws of Kansas. Federal jurisdiction was invoked on the ground that Congress had given the original builders of the bridge a franchise to charge tolls. This manifestly did not present a federal question because there was nothing to show that the federal statute had anything to do with the case. It was not claimed that the act of Congress exempted the bridge from the tax in controversy, or, as in the case at bar, that the collection of the tax would violate constitutional rights.

The petitioners further attack the Court's jurisdiction by arguing that the seizure of the talking sets in satisfaction of the tax would not violate the federal constitution. The complaint alleges otherwise (R. pp. 15-16; complaint paras. XIV-XV), the contention of the plaintiffs being that the threatened action of the defendants

is contrary both to the state law and to the Fourteenth Amendment (as to which latter see infra, IV). The argument of the defendants is that the Courts below should have defeated their jurisdiction by *assuming* that the plaintiffs had no meritorious case on the constitutional question. This argument is clearly unsound (*Cuyahoga Power Co. v. Akron*, 240 U. S. 462; *Old Colony Trust Co. v. City of Seattle*, 270 U. S. ___; 46 Sup. Ct. Rep. 552). A federal question raised by a pleading can be disregarded only where it is "so obviously insufficient as to cause it to be without color of merit and in effect no claim at all" (*Moore v. New York Cotton Exchange*, 270 U. S. ___; 46 Sup. Ct. 367, 370).

The decision of the Circuit Court of Appeals that the tax was invalid under the law of California (R. pp. 78-85) made it unnecessary to consider the federal question. But, since that question was presented by the complaint, the Court had jurisdiction and, consequently, power to decide the case if so advised on points of state law. See:

Bohler, Tax Collector, et al. v. Callaway, 267 U. S. 479, 489;

Chicago etc. R. Co. v. Kendall, Governor, et al., 266 U. S. 94, 98;

Louisiana Public Service Commission v. Morgan's etc. Steamship Co., 264 U. S. 393, 395;

Davis, et al. v. Wallace, et al., 257 U. S. 478, 482;

Greene, Auditor, et al. v. Louisville etc. R. Co., 244 U. S. 499, 508;

Camp v. Boyd, 229 U. S. 530, 551-552;

Siler, et al., Commissioners v. Louisville etc. R. Co., 213 U. S. 175, 190-191;

Ex parte Young, 209 U. S. 123.

II.

THE PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW AND ARE ENTITLED TO AN INJUNCTION.

A. The Defendants in the Proceeding, Against Which the Circuit Court of Appeals Ordered the Injunction to Issue, Were Acting for the Defendant County and for Sixteen Separate Municipalities, to which Substantial Parts of the Tax, if Collected, Would be Forthwith Distributed. The Plaintiffs Could Recover the Tax, if at all, Only by a Multiplicity of Suits (Answering Petitioners' Brief, pp. 15-16).

The plaintiffs allege (R. pp. 20-23) and the defendants admit (R. p. 47) that substantial parts of the tax in suit are to be collected by the defendants for sixteen separate municipalities enumerated in the complaint (R. pp. 21-22).

All these municipalities have availed themselves of the privileges conferred by the act approved March 27, 1895, as amended (Deering's General Laws 1925, Vol. 2, p. 3531; Cal. Stats. 1895, p. 219, as amended) to have the County of Los Angeles collect their taxes for them. This act provides for the levy and collection of city taxes by county officials, where the legislative body of the municipal corporation so elects.

Under Section 4 of this act, each municipality fixes its own tax rate. Section 5 provides that municipal taxes shall be collected at the same time and in the same manner as county taxes and that, when collected, they shall be paid to the treasurer of the municipal corporation to which they belong "under the general requirements and penalties provided by law for the settlement of other taxes". The general law requires the tax collector to pay all taxes in his hands to the county treasurer on the first Monday of each month (Pol. Code, Secs. 3753, 4126);

and further, to make such payment "at least once a month, and oftener, in his discretion" (Pol. Code, Sec. 4126).

In arguing (Petition pp. 15-16) that the plaintiffs could recover all of the tax in suit from the county, the petitioners not only assume that a suit would lie against the county, which is highly doubtful (infra II, C), but also run counter to Section 3804 of the Political Code, the very statute under which they claim that the plaintiffs could sue for refunds. That section does not make the county liable for taxes illegally or improperly collected for municipalities; on the contrary, it provides that refunds of such taxes can only be made out of money in the possession of the county treasurer

> "belonging to the appropriate fund of such * * * public corporation".

Since the law requires that taxes collected for municipalities be paid monthly, or oftener (Pol. Code, Sec. 4126), it is highly uncertain whether the county treasurer would at any time have municipal funds available for tax refunds. Moreover, under Section 1 of the statute (Act of March 27, 1895), *any municipality may at any time withdraw from the arrangement whereby the county collects its taxes*, and so destroy the only source from which the county could make a refund.

It is perfectly manifest, we submit, as the Circuit Court of Appeals held (R. p. 91), that even if the plaintiffs could pay the taxes and sue at law to recover them, they could enforce a complete refund only by suits against the county and the sixteen municipalities. This would involve a multiplicity of suits, which equity has jurisdiction to prevent.

See:

Raymond, Treasurer, et al. v. Chicago Traction Co., 207 U. S. 20, 38-40;

Wilson, County Collector, v. Illinois Southern R. Co., 263 U. S. 574, 576-577;

Waggoner et al. v. Wichita County, 298 Fed. 818 (Aff. 5th C. C. A., 3 F. (2d) 962);

Bank of Arizona v. Howe, Commissioner, et al., 293 Fed. 600, 605;

Waggoner v. Baylor County, 298 Fed. 822;

Standard Oil Co. v. Howe, Commissioner et al., 257 Fed. 481, 487.

B. Even if, Under the State Law, the Plaintiffs Could Pay the Tax and Sue at Law to Recover It, They Could Not Recover Interest (Answering Petitioners' Brief, pp. 17-19).

It is settled in California that a plaintiff who recovers wrongfully collected taxes cannot recover interest prior to judgment (*Engebretsen v. City of San Diego*, 185 Cal. 475, 479-480, 197 Pac. 651; *Spencer v. City of Los Angeles*, 180 Cal. 103, 115, 179 Pac. 163; *Miller v. County of Kern*, 150 Cal. 797, 798, 799, 90 Pac. 119; *Savings and Loan Society v. San Francisco*, 131 Cal. 356, 363; 63 Pac. 665; *United Taxpayers v. San Francisco*, 55 Cal. App. 239, 243, 203 Pac. 120; *Southwest Land Co. v. County of Los Angeles*, 46 Cal. App. 9, 15; 188 Pac. 575).

We have found no case, and the defendants have cited none, which holds that the right to recover taxes *without interest* affords an adequate remedy at law. The only cases, so far as we know, in which this subject has been considered, are the two cases cited by the Circuit Court of Appeals (R. p. 92), one of them decided by the Supreme

Court of California and the other by the District Court of the United States, for the Southern District of New York. These cases directly hold that the legal remedy under such circumstances is not adequate.

Birch v. Board of Supervisors of Orange County, 191 Cal. 235, 237, 215 Pac. 903;

Proctor & Gamble Distributing Co. v. Sherman, Attorney General, et al., 2 F. (2d) 165.

C. Any Possible Right of the Plaintiffs Under the State Law to Pay the Tax and Sue to Recover it, Either Under Section 3804 of the Political Code of California, or Otherwise, is Too Doubtful to Be Adequate (Answering Petitioners' Brief, pp. 13-14).

The usual procedure in California for the recovery of taxes, collected under a void assessment, is by suit, following payment under protest, in accordance with *Section 3819* of the Political Code. That section, however, affords no remedy in the case at bar, because, by its express terms, a suit under it will lie only by "the owner" of the property, or his representative, and not by any one else (*Warren v. City and County of San Francisco*, 150 Cal. 167, 170; 88 Pac. 712). The plaintiffs are lessees, not owners, of the talking sets.

To meet this consideration the defendants claimed in the Circuit Court of Appeals, and claim here, that the plaintiffs should proceed under another statute, Section 3804 of the Political Code (quoted Petition, p. 13). The Circuit Court of Appeals points out, however (R. p. 91), that this section does not purport to cover cases involving assessments claimed to be "void in whole or in part"—which are specifically covered by Section 3819—and that, in the absence of a decision by the Supreme Court of Cali-

fornia allowing an action under Section 2804, in circumstances reasonably like those in the case at bar, it would be inequitable to compel the plaintiffs "to take the chance of obtaining relief at law" (R. p. 91). To this point, that a doubtful remedy is not adequate, the Circuit Court of Appeals cited (R. p. 92) *Atlantic Coast Line v. Doughton, Commissioner, etc.*, 262 U. S. 413, 426, and *Davis v. Wakelee*, 156 U. S. 680, 688. To the same effect are:

Judicial Code, Sec. 267;

Bobler, Tax Collector, et al. v. Calloway, 267 U. S. 479, 488 ("If the remedy by law is doubtful, equitable relief may be had");

Wilson, Tax Collector v. Illinois Southern R. Co., 263 U. S. 574, 577 ("* * * The adequacy of a remedy at law must be clear");

Dawson, Attorney General, v. Kentucky Distilleries Co., 255 U. S. 288, 296 ("It is well settled that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit' ");

Wallace v. Hines, 253 U. S. 66, 69 ("* * * we might not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought");

Union Pacific R. Co. v. County Commissioners of Weld County, 247 U. S. 282, 287 (holding that a remedy under a state statute like Fed. Code, Sec. 2804, was doubtful and inadequate where its application had not been determined by the State Supreme Court).

D. Even if the Plaintiffs Could Maintain an Action at Law for the Tax, They Could Not Recover the Whole Amount Paid, Because Certain Costs of Collection Could Not, Under the State Law, Be Refunded (Answering Petitioners' Brief, pp. 16-17).

Section 6 of the Act of March 27, 1895 (Cal. Stats. 1895, p. 219), under which a county collects municipal taxes, provides that the county is entitled to the expenses of collecting them and that it shall

> "deduct such expenses from the taxes of such municipal corporation or city, while in the hands of the county tax collector, and transfer the same into the county salary fund * * *".

As shown in connection with Point II, A, the county, under Section 3804 of the Political Code, can make refunds of taxes collected for municipalities only from municipal funds. The quotation in the preceding paragraph from the Act of March 27, 1895, shows that collection costs are not part of the municipal funds, and consequently could not be repaid, even if the plaintiffs recovered a judgment at law. This circumstance, in itself, shows that any possible legal remedy is not adequate (*Hopwood, Treasurer, et al. v. Chicago Traction Co.*, 207 U. S. 20, 29).

III.

THE TAX OR SUIT IS INVALID UNDER THE STATE LAW (Answering Petitioners' Brief, pp. 19-20).

On this subject we refer to the opinion of the Circuit Court of Appeals (R. pp. 70-71), pointing out only the fundamental misconception in the statement of the defendants that the effect of the decision below is to "re-

empt" owners of operative property leased to public utilities from local taxation. The gross receipts tax does not effect a tax exemption; it is a substituted tax (*San Bernardino County v. State Board of Equalization*, 172 Cal. 76, 78; 155 Pac. 458). This substituted tax is a tax on property, not persons (*San Francisco v. Pacific Telephone and Telegraph Co.*, 166 Cal. 244; 135 Pac. 971; *Pacific Gas and Electric Co. v. Roberts*, 168 Cal. 420; 143 Pac. 709; *Lake Tahoe Ry. etc. Co. v. Roberts*, 168 Cal. 551; 143 Pac. 786; *Pullman Co. v. Richardson*, 261 U. S. 330). In the very nature of things, it rests, as the Circuit Court of Appeals held (R. p. 83), on all property contributing to gross receipts, which manifestly includes leased property as well as property held in fee.

IV.

THE TAX IN DISPUTE IS INVALID UNDER THE FOURTEENTH AMENDMENT

The Circuit Court of Appeals, having decided that the tax in dispute was invalid under the state law, found it unnecessary to decide the federal question raised by the complaint. To show, however, the substantial and meritorious nature of that question, we summarize briefly our contention that the threatened action of the defendants would violate the rights of the plaintiffs under the federal constitution. We contend:

1. Arbitrary and unreasonable discrimination in matters of taxation violates the due process clause (*Kidd-gee v. Wisconsin*, 270 U. S. 239; 46 Sup. Ct. 260, 261; *Chicago etc. R. Co. v. Kendall, Governor, et al.*, 266 U. S.

94, 97, 98; *Greene, Auditor, et al. v. Louisville etc. R. Co.*, 244 U. S. 499). We submit that taxation of leased property twice as heavily as property of the same kind which is not leased—and that would be the inevitable consequence of the tax in suit—is unreasonable, arbitrary and oppressive.

2. The California gross receipts tax is a property tax on the talking sets (*Pullman Co. v. Richardson*, 185 Cal. 484, 487; 197 Pac. 346, affirmed 261 U. S. 330, 337). The tax in suit, being also a property tax on the same property, would, therefore, result in double taxation. No other property in the state is taxed twice; every other kind of property pays only one tax. To uphold the tax in suit would, we submit, deny plaintiffs the equal protection of the laws, because the law of the state forbids double taxation (Pol. Code, Sec. 3607), and the state constitution (Art. XIII, Sec. 1) further requires all property in the state, with certain limited exceptions, to be taxed in proportion to its value. Double taxation may not be unconstitutional *per se*, but double taxation in the face of state laws forbidding it is a manifest denial of the equal protection of the laws (*Johnson, Treasurer, et al., v. Wells Fargo & Co.*, 239 U. S. 234; *Railroad and Telephone Companies v. Board of Equalization*, 85 Fed. 302, 317, and cases cited; *Louisville etc. R. Co. v. Bosworth, Auditor, et al.*, 230 Fed. 290, 300).

3. The state constitution provides that the gross receipts tax on operative property of public utilities is "in lieu of all other taxes and licenses, state, county and municipal". Taxation of operative property for local purposes, in the face of this provision, is a clear denial of

the equal protection of the laws and a seizure in satisfaction of such a tax is a manifest taking of property without due process of law.

We respectfully submit that the petition for certiorari should be denied.

Dated, San Francisco,
October 20, 1926.

Oscar Lawler,
F. D. Madison,
Alfred Sutro,
Attorneys for Respondents.

FILED
DEC 1
CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 133

ED. W. HOPKINS, Assessor of the County of Los Angeles, State of California, F. M. ROSS, Deputy Assessor of the County of Los Angeles, State of California; W. O. WELCH, Tax Collector of the County of Los Angeles, State of California; H. A. PAYNE, Auditor of the County of Los Angeles, State of California, and COUNTY OF LOS ANGELES, a body corporate and politic,

Petitioners,

vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY (a corporation), and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Respondents.

BRIEF OF RESPONDENTS.

(On Certiorari to the Circuit Court of Appeals for the Ninth Circuit. Opinion below (Tr. p. 42) reported 13 F. (2d) 817.)

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Respondents brought this suit to enjoin the collection of a local tax on three leased patented parts (by the petitioners collectively caled "talking sets"), of some 308,200 telephone instruments used by them in their telephone business in California. The question is whether the mere fact hat the "talking sets" are leased and not owned by respondents, makes them subject to local taxation, depite the substituted property tax on the full value threof which respondents pay the state in the form of a percentage of their gross receipts. The Circuit Court of Appeals held that the "talking sets" are not subject to local taxation, and directed an injunction to issue.

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vs.

SOUTHERN CALIFORNIA TELEPHONE COMPANY (a corporation), and THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

Respondents.

BRIEF OF RESPONDENTS.

(On Certiorari to the Circuit Court of Appeals for the Ninth Circuit. Opinion below (Tr. p. 42) reported 13 F. (2d) 817.)

STATEMENT OF THE CASE.

Respondents, plaintiffs below, brought this suit in the District Court for the Southern District of California to enjoin the County of Los Angeles, and certain of its officers from seizing and selling some 308,200 telephone "talking sets", which they lease, in satisfaction of a local tax of $52,224.45 (Tr. p. 16). A decree dismissing the complaint for lack of jurisdiction was reversed by the Circuit Court of Appeals, which directed an injunction to issue as prayed for by respondents (Tr. p. 54). Certiorari was granted by this court on November 29, 1926.

The controversy arises as follows: The State of California uses the so-called separated system of taxation, under which state and local revenues come from distinct sources. As part of this system many classes of public utilities pay the state, for state purposes, certain percentages of their gross receipts "in lieu of all other taxes and licenses, state, county and municipal," upon "their franchises, * * * poles, wires, * * * rights of way and other property, or any part thereof, used exclusively in the operation of their business in this state" (Const. Art. XIII, Sec. 14, Subd. a). The sharp question in the case is whether property *leased* by a telephone company and used exclusively in its telephone business, is subject to local taxation, despite the "in lieu" clause in the foregoing constitutional provision, and despite the fact, hereinafter shown, that the rates of the gross receipts tax were specifically fixed so as to make that tax the equivalent of a fair tax on all property *used* by public service corporations in their business, whether owned or leased, or howsoever held.

The "talking sets" in question are leased and not owned by respondents, and petitioners claim that they are, for that reason, subject to local taxation. Respondents contend that the local tax is invalid, both under the state law and under the federal constitution. The Circuit Court of Appeals, having sustained jurisdiction on the ground that the case involves a substantial federal question, held that, under the constitution and laws of the state, such local taxation is not permitted.

Petitioners claim that the main question in the case, in so far as it turns on the law of the state, has since the decision of the Circuit Court of Appeals been decided adversely to that decision by the State Supreme Court. The state court on July 2, 1927, did render such a decision in the case of *Pacific Telephone & Telegraph Co. v. State Board of Equalization, et al.*, 74 Cal. Dec. 96.* Subsequently, however, on the petition of the Telephone Company, it made an order granting a rehearing. The effect of this order, under the settled rules of the state court, was to "vacate the previous opinion and judgment and set the whole matter at large" (*Miller & Lux Incorporated v. James*, 180 Cal. 38, 48, 179 Pac. 174). We may add that the case against the Board of Equalization was an original proceeding in mandamus, which was dismissed by the applicant after the order for rehearing, because the controversy in that proceeding had become moot. Further reference to this case is made below (infra pp. 21-23).

* The reference "Cal. Dec." is to "California Decisions", the unofficial advance publication of the state court's opinions.

THE FACTS.

Respondents, California corporations, are telephone companies operating in Los Angeles County, California. During 1925 they had in use in that county upwards of 300,000 telephone instruments. Each instrument consists of (1) a receiver, transmitter and induction coil (for which petitioners coined the collective name "talking set"), (2) a stand in the case of a desk telephone, or a body in the case of a wall telephone, and (3) the necessary wiring. Respondents own the stands, bodies and wiring. They do not own the receivers, transmitters and induction coils, but lease them from the American Telephone and Telegraph Company, which is a New York corporation not operating in California.

In March, 1925, respondents, as required by the state law (Political Code, Sec. 3665c, quoted Appendix I, also infra p. 71), reported their operative property to the State Board of Equalization, including in their reports the telephone instruments, of which the "talking sets" were integral parts. The county assessor, who is one of the defendants and petitioners in this case, made no protest against the inclusion of the "talking sets" in these reports, which he should have done, if he objected to the inclusion—a fact in and of itself sufficient under section 3666 of the Political Code, as construed by the Supreme Court of the state, to render the tax in dispute utterly void (infra pp. 70-77).

In due course respondents paid the state some $2,340,000 for their gross receipts taxes for the year 1925-1926 (Tr. p. 29). All proceedings of respondents in this behalf were admittedly regular.

In April, 1925, the county assessor assessed the tax in suit amounting to $52,224.45 against the American Tele-

phone and Telegraph Company, as owner of the "talking sets". His theory was that the gross receipts taxes of respondents are in lieu of local taxes on operative property *owned* by them, but do not preclude local taxation of *leased* operative property.

The American Company did not pay the tax and the assessor threatened to seize and sell the "talking sets" (Tr. p. 6). Respondents brought this suit to enjoin such seizure and sale. Federal jurisdiction was invoked on the ground that the case involved a federal question, the bill alleging that the tax is invalid under the Fourteenth Amendment as well as under the state law. Equity jurisdiction was invoked on the ground that there is no adequate legal remedy for the disruption of respondents' business and consequent irreparable damage which the threatened seizure and sale of the "talking sets" would involve.

For convenience of reference the several paragraphs of the complaint by number, omitting paragraphs I-V and XVII and XVIII, which contain usual formal allegations, may be summarized as follows:

VI. Plaintiffs maintain and operate upwards of 300,000 telephone instruments in Los Angeles County. Each instrument consists of a so-called "talking set", besides a stand or body and the wiring and other apparatus connected therewith, all of which parts are indispensable to the operation of the instrument (Tr. pp. 3-4).

VII. The "talking sets" are owned by the American Telephone and Telegraph Company and are leased by it to plaintiffs; plaintiffs own the other parts of the instruments (Tr. p. 4).

VIII. On or about April 29, 1925, the defendant Hopkins, as county assessor, sent the American Telephone and Telegraph Company a notice, set out in the complaint (Tr. pp. 4-5), that a tax of $57,017. had been assessed upon 308,200 telephone "talking sets" and demanding payment of the same. A subsequent notice (Tr. p. 5) of the delinquency of the tax was sent to the American Company under date of June 12, 1925 (Tr. pp. 4-5).

IX. Under date of July 8, 1925, the assessor sent the American Company a notice in care of the two plaintiffs (Tr. p. 6), saying that if the tax was not paid immediately he would proceed to collect it by seizing and selling as many of the "talking sets" as might be necessary.

X. The "talking sets" are operative property of plaintiffs, that is to say, property used exclusively in their business in California. Plaintiffs duly reported their instruments, including the "talking sets", to the State Board of Equalization as operative property, as provided in section 3665b of the Political Code of the State of California, and the assessor filed no protest against classifying them as operative property (Tr. p. 7). The assessor should have filed such a protest if he claimed that the "talking sets" were nonoperative property (Pol. Code, Sec. 3666).

XI. Under section 14 of article XIII of the state constitution, taxes upon the "talking sets" are entirely and exclusively for state purposes. Plaintiffs have paid, or are ready, willing and able to pay, gross receipts taxes to the State of California as provided by law, and such gross receipts taxes are in lieu of all other taxes and licenses, state, county and municipal, upon the operative

property of plaintiffs, including the "talking sets". The pretended local tax or assessment is unlawful and void (Tr. p. 8).

XII. The laws of California contain no provision whereby plaintiffs could pay the tax under protest and bring suit to recover it. Even if it were possible under the state law to recover the tax in an action at law, plaintiffs could not recover interest thereon (Tr. pp. 8-9).

XIIa. The defendant county, if it collects the tax, will forthwith distribute substantial parts of it among sixteen separate municipalities, named in the complaint, and plaintiffs could recover the parts of the tax so distributed, if at all, only in a multiplicity of suits (Tr. pp. 12-14).

XIII. The threatened seizure and sale of the "talking sets" would disrupt and paralyze the telephone service of plaintiffs within the County of Los Angeles, to their great and irreparable injury. The consequent loss, damage and injury from such seizure or sale would greatly exceed the sum of $3000 (Tr. p. 9).

XIV. The threatened seizure and sale would deprive plaintiffs of their right to transmit messages between Los Angeles County and other places in the United States and would deprive plaintiffs of their property without due process of law, and would deny them the equal protection of the laws and is and would be in violation of the rights, privileges and immunities of plaintiffs under the Fourteenth Amendment to the Constitution of the United States (Tr. p. 9).

XV. In so far as the statutes of California, under which defendants claim to act (which statutes are enumerated in the complaint), purport to authorize the

threatened seizure and sale, they are contrary to the Fourteenth Amendment and void (Tr. pp. 9-10).

XVI. Although plaintiffs claim the tax is void, they offer to pay it if it is held valid (Tr. p. 10).

The defendants (petitioners in this court) filed an answer admitting practically all the facts alleged in the complaint (Tr. pp. 14-19). They also made a motion to dismiss, claiming that the court was without jurisdiction; that respondents had an adequate remedy by paying the tax and suing at law to recover it, and further, that the tax was valid (Tr. pp. 20-21).

At the hearing of the motion to dismiss respondents introduced evidence in support of the few controverted allegations of the complaint (Tr. pp. 26-30). The case was then by stipulation submitted for decision as follows: On motion to dismiss and, in the event that the motion should be denied, then, without further hearing, for final determination upon the application for a permanent injunction (Tr. pp. 29-30). There was no hearing upon the application for a preliminary injunction, the temporary restraining order granted on the filing of the bill having been kept in effect by stipulation (Tr. p. 25).

The trial court, although it strongly intimated in its opinion that respondents were entitled to relief on the merits, granted the motion to dismiss on the ground that, while it had jurisdiction over the case, policy required that the questions involved be left to the state courts for decision (Tr. pp. 31-32). The decree dismissing the bill, as above stated, was reversed by the Circuit Court of Appeals.

PRELIMINARY REFERENCE TO JURISDICTIONAL QUESTIONS INVOLVED.

The jurisdictional questions fall under two heads—(1) federal jurisdiction and (2) equity jurisdiction. Petitioners commence their brief with a discussion of these questions. The close relationship, however, between the merits of the case and the question of federal jurisdiction has led us at the outset to make only a preliminary reference to the jurisdictional questions, and to present our argument on them after our argument on the merits.

Equity jurisdiction is invoked on the ground that respondents have no adequate remedy at law because—(1) the state law does not permit respondents as lessees, to maintain an action at law to recover the tax if paid; (2) in any event, they could not recover interest on the tax if paid, and (3) even if they could recover the tax if paid, they could do so only in a multiplicity of suits against the county and the sixteen municipalities, to which the county would distribute the parts of the tax collected for them.

The case involves the jurisdictional amount, and federal jurisdiction, there being no diversity of citizenship, depends on whether the bill raises a federal question. Under the settled rule of this court that question in turn depends upon whether the claim of respondents that the collection of the tax would violate their rights under the Fourteenth Amendment, is substantial and *bona fide* (*Greene, Auditor of Kentucky, et al. v. Louisville etc. R. Co.*, 244 U. S. 499, 508; *Raymond, Treasurer of Cook County, Illinois, v. Chicago Traction Co.*, 207 U. S. 20, 35 (infra pp. 101-107)).

Petitioners admit that the claim of federal right is made in good faith (Petitioners' Br. p. 11). Jurisdiction, therefore, is established unless the claim is "so obviously insufficient as to cause it to be without color of merit and, in effect, no claim at all" (*Moore v. New York Cotton Exchange*, 270 U. S. 593, 609).

That respondents' claim of constitutional right, as presented by the bill of complaint, is substantial, may, we think, be briefly shown as follows:

The tax in suit is on the full value of the "talking sets". The gross receipts tax is also on the full value of the sets, because it is a substituted property tax, the rates of which were specifically fixed to include all taxes justly due on all property used in operation, including leased property. No other leased property in California is taxed at its full value to both lessor and lessee. To require respondents to pay in the form of the gross receipts tax a tax on the full value of the "talking sets", in which they have only a leasehold interest, and at the same time to bear, as they must, the ultimate burden of the local tax on the same property, would discriminate against them in favor of all other lessees in the state who do not pay gross receipts taxes, including certain public utilities, such as water companies and ferries. These discriminations are not based upon any reasonable classification. Furthermore, if the tax in suit is valid, it necessarily follows that the burden of the gross receipts tax on the owned property of public utilities will increase with the amount of property leased, thus arbitrarily discriminating against respondents in favor of all public utilities operating less or no leased property.

Independently of the foregoing, the double tax burden for which petitioners contend, in the face of state statutory provisions expressly forbidding double taxation, would deprive respondents of the equal protection of the laws.

The Circuit Court of Appeals held that the allegations of the bill of complaint raised a substantial federal question and were sufficient to establish jurisdiction. In concluding its discussion on this subject the court said (Tr. p. 53):

> "The conclusion we draw from the language of the Constitution and the statutes is that the gross receipts tax is a proper tax on the talking sets and that the levy threatened by the local authorities would result in the imposition of a double tax on the same property, effected not merely by a mistake, but with intent to adopt as a practice an unlawful discrimination, and that remedy by injunction will lie (Chicago G. W. R. v. Kendall, 266 U. S. 94).
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> As a sequel to what we have said, we hold that the District Court was correct in the opinion that it had jurisdiction and in the intimation that the merits were with the plaintiffs, but we think it erred in declining to exercise the jurisdiction. Decision that there was power to hear and determine removed any question of discretion, and left a bounden duty to proceed to a decree."

Since federal jurisdiction here depends upon the substantial nature of the federal constitutional question, which in turn, involves the nature and effect of the state tax laws, it seems fitting to first discuss the state law. If jurisdiction is established, it extends, of course, to questions of state law along with all other questions in the case (infra, p. 115).

ARGUMENT.

Our argument is as follows:

(1) The state law does not permit local taxation of leased property used in operation by telephone companies;

(2) The particular tax in dispute is void under the state law for the special reason that the county assessor did not protest against the inclusion of the "talking sets" in the reports of respondents' operative property to the State Board of Equalization;

(3) The tax in dispute is invalid under the federal constitution;

(4) The case is within the jurisdiction of the federal courts, and

(5) The case is one for equity jurisdiction.

I.

LOCAL TAXATION IN CALIFORNIA OF PROPERTY LEASED AND USED BY A TELEPHONE COMPANY IN ITS OPERATIONS IS INVALID UNDER THE STATE LAW.

First: Preliminary considerations.

A. Outline of the former system of taxation in California.

Prior to 1910 there was in California generally speaking no separation of subjects of state and local taxation. State revenues, save for comparatively small amounts derived from such sources as the poll tax, inheritance tax and miscellaneous fees, came, like local revenues, from *ad valorem* taxes on property.

The state and the various counties and municipal bodies had their respective tax rates. Valuation and assessment were largely local affairs, the state tax rate and the several local tax rates being alike applied to valuations

fixed by local assessors. The State Board of Equalization had equalizing powers over the local assessments and the Board also assessed railroad lines running through more than one county (see Political Code, Sec. 3664, et seq., prior to 1911).

B. Creation and work of the Commission on Revenue and Taxation and outline of the present system of taxation under which, as part of the plan for separation of the sources of state and local revenues, certain public utilities pay the state fixed percentages of their gross receipts in lieu of all other taxes and licenses on their properties used in operation.

The old system of taxation having led to serious abuses and inequalities, the legislature in 1905 provided for a Commission on Revenue and Taxation to devise means of reform (Stats. 1905, p. 390). The Commission, which was continued by legislation in 1909 (Stats. 1909, p. 779), mapped out the system now in effect. This system is embodied in section 14 of article XIII of the state constitution, adopted at the election of 1910, after a substantially similar measure (*Story v. Richardson*, 186 Cal. 162, 165, 198 Pac. 1057) had been defeated in 1908.

The Commission on Revenue and Taxation made two reports, one in 1906 and the other in 1910, which are official publications of the state (Appendix to Journals of Senate and Assembly, 37th Session, 1907, Vol. 2, and 39th Session, 1911, Vol. 1). They also appear in separate publications issued by the state.

Being part of the legislative journals, they are, we think, clearly within the judicial knowledge of this court (*Town of South Ottawa v. Perkins*, 94 U. S. 260, 268; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 414; *Lamar v. Micou*, 114 U. S. 218, 223; *Connole v. Norfolk etc. R. Co.*, 216 Fed. 823, 825).

We have printed as Appendix II to this brief, Chapter 3 of Part III of the 1906 report, entitled "Gross Earnings Tax in Theory and Practice". Other relevant parts of this report and of the 1910 report are printed from time to time as part of our argument.

These reports are recognized as authoritative sources by the State Supreme Court. In *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 156 Pac. 502, the court said (172 Cal. 351):

> "The state had appointed a learned commission on revenue and taxation, whose labors extended over many years. In 1906 they promulgated their first report. In 1910 they put forth their second report. These reports were most widely distributed, at the state's expense, with the avowed purpose of educating its people to a knowledge of the reasons why the change in the method of taxation of public service corporations, banks, insurance companies, etc., was deemed most desirable, and to an understanding of the benefits which follow the adoption of the new method. Those reports themselves are official publications of the state (Appendix to Journals of Senate and Assembly, 39th Sess., 1911, Vol. 1)."

In *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057, the court said (186 Cal. 165):

> "The provision of the constitution here under consideration was adopted by the people of the state at the election of November, 1910, as the result of a movement to separate state and local taxation. In 1905 a commission was authorized to investigate the system of revenue and taxation in force in this state and recommend a revision thereof (Stats. 1905, p. 390). The commission appointed proposed an amendment to the constitution (Report of the Commission on Revenue and Taxation of the State of California, 1906, vol. 2, Appendix to Journals of Senate and Assembly of California, Session 1907). In 1910, after some alterations, the amendment was submitted to

the people and adopted by them. The amendment as adopted was fundamentally the same as that proposed by the commission in its report in 1906, and that report may, therefore, be considered in determining the meaning of doubtful provisions."

See also:

Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 423, 143 Pac. 700;

Union Tank Line Co. v. Richardson, 183 Cal. 409, 413, 191 Pac. 697;

Pullman Co. v. Richardson, 185 Cal. 484, 504, 507, 197 Pac. 346 (Aff. 261 U. S. 330);

Bankers Life Co. v. Richardson, 192 Cal. 113, 119, 218 Pac. 586.

As "the first step in reform" (*Report of Commission on Revenue and Taxation*, 1906, p. 11), the constitutional amendments of 1910 adopted the principle of separation between the subjects of state and local taxation, by which the state and the various municipal bodies were to obtain their revenues from distinct sources and the subjects of taxation by the one were, generally speaking, to be relieved of taxation by the other.

Under the separated system the principal sources of state revenue were to be the gross receipts tax to be paid by certain public utilities, the tax on bank stocks, the tax on insurance premiums and the tax on corporate franchises (*Report of Commission on Revenue and Taxation*, 1906, p. 11).

The reasons for adopting the plan of taxing these public utilities for state purposes exclusively and upon the basis of their gross receipts are set out in the reports of the Commission on Revenue and Taxation. They were

generally discussed by the Circuit Court of Appeals in its opinion (Tr. pp. 44-46) and they have also been discussed by the State Supreme Court in *San Francisco v. Pacific Telephone etc. Co.*, 166 Cal. 244, 135 Pac. 971; *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 351, 156 Pac. 502 and *Story v. Richardson*, 186 Cal. 162, 165, 166, 198 Pac. 1057. A detailed statement of them is not within the proper scope of this brief, but they may, we think, be topically summarized, with substantial accuracy, as follows:

1. A gross receipts tax is preferable to other methods of taxation:

(a) because of its practical advantages (*Report of Commission on Revenue and Taxation*, 1906, pp. 91-93, 157, et seq; *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 425, 143 Pac. 700);

(b) because gross receipts, besides reflecting the value of the property used, also necessarily reflect going concern value and other intangible property of public service corporations which cannot be fairly taxed under the old system (*Report of Commission on Revenue and Taxation*, 1906, pp. 12-13; *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 423, 424, 143 Pac. 700; *Story v. Richardson*, 186 Cal. 162, 166, 198 Pac. 1057); and

(c) because a gross receipts tax "would result in a far closer approximation to justice and equality than any other tax which the State could select" (*Report of Commission on Revenue and Taxation*, 1906, p. 92).

2. The gross receipts tax must be for state purposes exclusively and in lieu of all local taxation:

(a) because the state is the only instrumentality capable of administering such a tax (*Report of Commission on Revenue and Taxation*, 1906, pp. 81-82);

(b) because the revenue derived in taxes from large general organizations, like railroad and telephone companies, which, in their essential nature, are general, not local (*Report of Commission on Revenue and Taxation*, 1906, pp. 6, 14, 77; *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 351-352, 156 Pac. 502), justly belongs to the state and the localities have no equitable claim to it (*Report of Commission on Revenue and Taxation*, 1906, p. 10; *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 351-352, 156 Pac. 502); and

(c) in order to relieve public utilities of the unequal and unjust burdens resulting from multiple local taxes and assessments (*Report of Commission on Revenue and Taxation*, 1906, pp. 60, 88; *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 423, 143 Pac. 709), and also to relieve them from such questionable practices as gerrymandering "shoestring" school and irrigation districts along the lines of railroads or around other property of public utilities (*Report of Commission on Revenue and Taxation*, 1906, p. 88).

The new state tax, though measured by gross receipts, was in no sense regarded as an earnings or income tax on public utilities. The Commission framed it as a property tax, and the State Supreme Court has since definitely and repeatedly held it to be such (infra, p. 35). The tax was laid upon all property contributing to operating

revenues, and *the rates were specifically computed to yield a fair tax on all property used by public utilities in public service, whether owned or leased or howsoever held* (infra, pp. 23-34). As stated by the Commission, the gross receipts tax was therefore

> "to be in lieu of all other taxes except taxes on property not necessarily used in the operations conducted by the companies" (*Report of Commission on Revenue and Taxation*, 1906, p. 12).

In recompense for property to be thus withdrawn from local taxation, the constitutional amendments of 1910 provided that all other property should be withdrawn from state taxation, and should be subject only to local taxation (*Report of Commission on Revenue and Taxation*, 1906, pp. 87-90). By adding to the local rate on property subject to local taxation such part of the former state rate on such property as might be necessary, the localities could make up for loss of taxes on property withdrawn from local taxation because used by public service corporations, without increasing the total tax burden on the property remaining subject to local taxation. Except for one or two sparsely settled counties, which derived their chief revenues from long stretches of railroad track (*Report of Commission on Revenue and Taxation*, 1906, pp. 87-88) the new system was computed to result in substantial tax savings for the municipal bodies of the state (*Report of Commission on Revenue and Taxation*, 1906, pp. 88-90, 1910, pp. 20-37, 55-77).

Such in brief was the purpose and intent of the framers of the constitutional amendment.

C. Quotations from the state constitutional and statutory provisions regarding the gross receipts tax.*

Section 14 of article XIII of the constitution, omitting enumeration of other public utilities than telephone companies, provides in part as follows:

> "Sec. 14. Taxes levied, assessed and collected as hereinafter provided upon * * * telephone companies * * * and taxes upon all franchises of every kind and nature, *shall be entirely and exclusively for state purposes*, and shall be levied, assessed and collected in the manner hereinafter provided. * * *
>
> (a) * * * all telegraph and telephone companies * * * shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof, *used* exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within this state.
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> * * * * * * *
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> *Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies* except as otherwise in this section provided;**
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> * * * * * * *
>
> (f) All the provisions of this section shall be self-executing and the Legislature shall pass all laws necessary to carry this section into effect" (italics ours).

Section 3665a of the Political Code defines "gross receipts from operation" as including "all sums received from business done within this state", without deductions of any kind except for refunds for errors or over-

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* These provisions are quoted in full in Appendix I.

** The exception is to pay bonded debts, or interest thereon, outstanding when the amendment was adopted.

charges. The same section provides that income from "nonoperative property" shall not be included in gross receipts and further provides that the Board of Equalization shall make allowances necessary to avoid double taxation.

Section 3664a fixes the tax to be paid by telephone companies at five and a half per cent. of their gross receipts.

Section 3665b defines "operative property", on which the gross receipts tax is in lieu of all other taxes. Operative property of telephone companies includes (Subd. "d"):

> "The franchises, rights of way, poles, wires, pipes, conduits, cables, switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings *used* in the telegraph and telephone business and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings" (italics ours).

The same section also provides (Subd. "e"):

> "* * * the operative property of the companies enumerated in this section, shall also include any other property not above enumerated that may be reasonably necessary for *use* by said companies exclusively in the operation and conduct of the particular kinds of business enumerated in section three thousand six hundred sixty-four *a* of this code" (italics ours).

Following sections prescribe the procedure for the filing of reports by public utilities with the State Board of Equalization, for the assessment of gross receipts taxes by the Board, for the lien of the tax and for other matters.

Second: The question here involved is an open one in the state courts. Under the settled rule of the State Supreme Court the effect of the order granting a rehearing in the case of Pacific Telephone & Telegraph Co. v. State Board of Equalization, 74 Cal. Dec. 96, was to "vacate the previous opinion and judgment and set the whole matter at large".

Petitioners' argument that the validity of local taxation of leased property used by public utilities in California has been established by the State Supreme Court in the case of *Pacific Telephone & Telegraph Co. v. State Board of Equalization*, 74 Cal. Dec. 96, is, we submit, completely answered by the fact that the decision and opinion in that case were vacated and set aside by the order made on August 1, 1927, granting the petition for rehearing (see state court minutes, following 74 Cal. Dec. 178). This court accords no greater effect to a state decision than the state court which rendered it (*Wright v. Georgia R. and Banking Co.*, 216 U. S. 420, 429).

In *Argenti v. San Francisco*, 16 Cal. 255, the court said in an opinion delivered by Chief Justice Field, later Justice Field of this court (p. 276):

> "It may be observed here, before proceeding to consider these contracts, that the opinion rendered in *Seale v. The City of San Francisco*, at the July term, 1858, to which reference is made, *never became authority*. A rehearing was granted in that case, and no one is better aware than the learned counsel for the defendant, that *when a rehearing is granted, the opinion previously delivered falls, unless reaffirmed after the reargument. Until such reaffirmance, the opinion never acquires the force of an adjudication, and is entitled to no more consideration than the briefs of counsel*" (italics ours).

In the recent case of *Miller & Lux Incorporated v. James*, 180 Cal. 38, 179 Pac. 174, the court said (180 Cal. 48):

> "The first decision rendered upon the appeal (47 Cal. Dec. 1) was vacated by the order granting a rehearing, and is not reported in the California Reports. While it is true that the order granting such rehearing limited the argument to the question of the effect of the public user, the order, nevertheless, *vacated the previous opinion and judgment and set the whole matter at large.*"

See also:

Welton v. Cook, 61 Cal. 481, 487;

Poppe v. Athearn, 42 Cal. 606, 610 (Reporter's Note).

It may further be noted that an opinion in a case in which a rehearing has been granted is not published in the official California reports (*Miller & Lux Incorporated v. James*, 180 Cal. 38, 48, 179 Pac. 174).

No further action was taken in the *Pacific Telephone* case after the granting of the petition for rehearing, because the controversy had become moot. The suit involved an application for mandamus to compel the State Board of Equalization to put property leased and used by the applicant on the 1927 "operative roll", that is to say, upon the list of property subject only to state taxation (Political Code, Sec. 3668a). This roll is delivered by the Board to the State Treasurer on the first Monday in July (Political Code, Sec. 3668a). The Supreme Court rendered its opinion denying the application for mandamus on July 2, 1927, which was the Saturday preceding this Monday. The Board thereupon delivered the roll. Inasmuch as

the relief sought by applicant could not be thereafter granted (*San Diego etc. R. Co. v. State Board of Equalization*, 164 Cal. 41, 127 Pac. 153), it is obvious that the only possible purpose of granting the rehearing on August 1, 1927, was to reopen the important question as to the local taxability of leased operative property.

The mandamus proceeding having thus become moot, there was nothing for the Telephone Company to do except to dismiss it. The state court has repeatedly held that it will not decide moot questions and that moot cases will be dismissed (*Estate of McSwain*, 176 Cal. 287, 168 Pac. 117; *Matter of Ambrose*, 170 Cal. 160, 149 Pac. 43; *Wright v. Board of Public Works*, 163 Cal. 328, 125 Pac. 353; *Bradley v. Voorsanger*, 143 Cal. 214, 76 Pac. 1031).

Third: Local taxation of property leased and used by public service corporations is contrary to the fundamental principles of the gross receipts method of taxation, as explained by the Commission on Revenue and Taxation and established by decisions of the State Supreme Court.

A. The rates of the gross receipts tax were so fixed as to make that tax equivalent to a just tax on all property used in operations by public utilities whether owned or leased.

The Commission on Revenue and Taxation carefully considered the status of leased property in fixing the percentages of their gross receipts which the several public utilities should pay, and *it fixed these percentages so as to make the gross receipts tax equivalent to a fair tax on all property used in operations, whether owned or leased.* That fact is, we submit, in itself a complete demonstration that local taxation of leased property used

by public utilities is theoretically indefensible and fundamentally unjust.*

That the rates were fixed in the manner stated is established beyond all question by the reports of the Commission. For the sake of clarity, we will trace step by step the matters which led the Commission to consider the question here in issue, and to declare that the gross receipts tax is in lieu of all other taxes on operative property, whether owned or leased.

As a preface to its explanation of the way in which the rates of gross receipts taxation were fixed, the Commission mentioned the necessity for making this gross earnings tax "just and fair compared with other taxes" (*Report of Commission on Revenue and Taxation*, 1906, p. 91, also p. 168, et seq.). The Commission said (p. 93):

> "EQUAL TAXATION.
>
> In all of those states in which, in recent years, a change has been made in the taxation of public-service corporations, either from the ad valorem system to a gross earnings tax, or from a gross earnings tax back to an ad valorem system, or in which any substantial change or reform has been suggested in regard to the taxation of public-service corporations, the question has always been raised whether the proposed rates or methods of taxation for such companies would result in 'equal taxation'. It is difficult to determine exactly what is meant, in this connection, by 'equal taxation,' but in the popular mind, as expressed during the discussions of such proposed reforms, there has been an idea that, by whatever method a railroad, for example, may be taxed, the burden of taxation thereon should be, and must be,

*The state court in its opinion in the *Pacific Telephone* mandamus case did not mention the subject of the rates of the gross receipts tax having been fixed to include taxes on leased operative property. This is readily explained, however, by pointing out that the matter though adverted to at the oral argument was not emphasized until in the petition for rehearing

as heavy as that which is borne by a farmer or by an owner of real estate and personal property on the regular assessment rolls. The idea seems to be that if the tax is levied upon the gross earnings, it must result in the imposition upon a railroad or other public-service corporation of a burden fairly equal to that which it would bear if fully assessed on an ad valorem basis as any other property might be.

In view of the strength of the popular feeling that taxes should be 'equal', and of the obvious and essential justice of such a demand, *is highly important to discover a practical method for determining whether the burden of a tax which it is proposed to impose upon the gross earnings of a given class of corporations is the equivalent or not of a tax which might be levied under an ad valorem plan.* Such a method has been devised by this Commission. By the application of this method we can ascertain what rate of tax on the gross earnings is the equivalent of a given tax rate on the property, and *vice versa*" (italics ours).

Before quoting the Commission's statement of the method to which it thus referred, we point out that any comparison of the gross receipts tax with a fair tax on other property obviously involves a valuation of the property on which the gross receipts tax is to rest. Such a valuation the Commission made by using *net* earnings as a basis. This does not mean that it compiled net earnings statements of all public utilities which were to pay the gross receipts tax. Instead, as a measure of value, it ascertained and took into account the proportions usually obtaining between gross and net earnings from the operative property of various classes of public service corporations.

The Commission found that public service corporations fall into distinct classes with respect to the percentage

between gross earnings and net earnings. Railroads, for instance, have a higher percentage of net earnings than telephone companies, which in turn have a higher percentage than express companies.

The value of property, of course, ultimately depends on its net earnings (*Cleveland etc. R. Co. v. Backus*, 154 U. S. 439, 445; *Pullman Co. v. Richardson*, 185 Cal. 484, 496, 197 Pac. 346). Capitalizing net earnings at a proper interest rate gives the value of the property. Since, as the Commission found, the proportion between gross earnings and net earnings of the various classes of public service corporations can be ascertained, the value of the property to be taxed by the gross receipts method has an ascertainable relation to gross earnings and can be approximately valued from its gross earnings. By fixing the gross receipts tax at a rate sufficient to yield a fair tax on such value, the gross receipts tax would be made "equal" to the burdens on property taxed on the *ad valorem* plan.

The foregoing considerations underlie the Commission's method for ascertaining what tax rate on gross earnings is approximately the equivalent of a given rate of taxation of property. This method it explained as follows (*Report of Commission on Revenue and Taxation*, 1906, pp. 94-95):

> "Briefly stated that method is: To determine what tax rate on gross earnings is the equivalent of a given rate on the property, for a given class of public-service corporations, (1) ascertain what percentage of the gross earnings is net, (2) ascertain what rate of interest would constitute a fair return to investors in the securities of the class of public-service corporations under consideration, then (3) divide the

percentage of net earnings by the rate of interest and multiply the result by the given tax rate on property.* *This method is not as rigid or as infallible as the mathematical statement of it might seem to imply. There is still room for difference of opinion.* But it has been found of great practical value in testing the probable effect of different rates on any set of assumptions (italics by the Commission).

CLASSIFICATION OF CORPORATIONS.

The first step in the application of this method by the Commission was the determination of the class to which a corporation belongs by virtue of the percentage which its net earnings bears to its total gross earnings. An examination of the accounts of different classes of public-service corporations showed that they fall into very distinct classes according to the percentage which their net earnings bear to their gross earnings. This does not mean that every company belonging to a given class has the same percentage of net earnings to gross. But merely that *each of the great classes of public-service corporations presents a type* to which the individual companies tend to conform, and from which they differ only while young or while for some other reason incomplete or imperfect.

Thus, for example, we found that railroad companies, operating steam railroads, normally pay about 64% of their gross earnings for operating expenses, leaving 36% to pay interest upon bonded indebtedness, dividends upon capital, and similar items. That is, out of every $100 received, $64 goes to pay for wages, fuel, maintenance of way and equipment, and other items of cost involved in operation, and $36 is left for payment of interest on bonds, dividends on stock, and similar items. It is this $36 which gives value to the property. For fifteen years this average rate had not

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*"Expressed algebraically, let t equal the tax rate sought, n equal the percentage of net earnings to gross, i equal the interest rate on the investment, and r equal the given tax on property; then: $t = \frac{n}{i} \times r$" (footnote by the Commission).

varied in the United States as a whole more than two points. City water companies, to take another example, ordinarily have a very much lower percentage of operating expenses, often as low as 25%, and consequently have as high as 75% net earnings, or funds available for the payment of interest and dividends. Other classes of corporations again, such as the telephone companies and express companies, have relatively high operating expenses and only a small proportion of net revenues. As it is the amount of net revenue which determines the value of the property of these corporations as of any other property, so on the well-known principle of 'capitalizing' the income at a predetermined or agreed rate of interest, it will readily be seen that a corporation with net returns large in proportion to its gross earnings has a larger property or capital value than one with a smaller percentage of net earnings. For example, as has been said, railroads earn about 36% net out of all receipts, and if this were capitalized at 6% would have $600 of capital for every $100 of gross earnings; another class of corporations earning, say, 24% net, would, if capitalized at 6% have $400 worth of property for every $100 of gross income, while a city water company with 60% net, if capitalized at 6% would have $1000 worth of property for every $100 of gross income. If, however, 8% be taken as the rate of interest constituting a fair return to be allowed the stock and bond holders upon their investment, and as the basis for capitalization, these sums would change, and railroads with 36% net would have $450 of capital for every $100 of gross earnings; a company with 24% net would have $300 of capital for every $100 of gross earnings, and a water company with 60% net would have $750 for every $100 of gross earnings.

Computing the Tax Rate.

In order to compute what rate of taxation on gross earnings is the equivalent of a given rate of taxation on the property, we have simply to divide the percentage of net earnings by the assumed rate of capitalization and multiply the result by whatever tax

rate on the property we wish to compare the gross earnings rate with. Thus, for example, if we wish to impose, in the form of a gross earnings tax, a burden which shall be the equivalent of a tax of 1½% on the property, then in the case of a railroad, taking the figures assessed above, we divide 36 by 6 or 8, whichever shall be determined upon as a fair rate at which to capitalize railroad earnings, and multiply the result by 1½, obtaining, at 6%, 9% as an equivalent rate on gross earnings, or at 8% as a basis of capitalization, 6¾%. If the tax rate on property or capital were fixed at 1%, the above rates would become 6% and 4½%."

The foregoing quotations make it clear that the Commission on Revenue and Taxation regarded gross receipts as merely the measure of the tax to be paid by public service corporations; the tax itself, in its essential nature, was to be *a fair tax on property valued by net earnings*. This consideration squarely raised before the Commission the questions involved in the case at bar, namely: On what property does the gross receipts tax rest? Does it include leased property? *The Commission said that the gross receipts tax does include taxes on leased property; it pointed out that this is necessarily so, because the property subject to the tax is valued on the basis of net earnings, and in capitalizing net earnings to establish such value the earnings of leased property are included without deduction for rents, thus inevitably including leased property in the value reached.* The Commission said (*Report of Commission on Revenue and Taxation*, 1906, pp. 95-96):

"Net Earnings Defined.

In applying the above method it is obvious that we must have a fixed and uniformly applied definition of what constitute net earnings. Since the object of ascertaining the net earnings is to ascertain from them

the value of the property, it is obvious that the net earnings should include *all things* and only such things *as belong to the owners of the property, whether they be the stockholders, or the bondholders, or the lessors of property used by the corporation* (our italics). Hence the operating expenses, which are deducted from the gross earnings in order to ascertain the net earnings in this sense, should include only the bare expenses of operation and of maintenance to the narrowest sense of those terms. The operating expenses would include, in the case of a railroad, only the items which are denominated and defined by the Interstate Commerce Commission as 'maintenance of way and structures,' including: 'repairs of roadway and renewal of rails and ties,' 'repairs and renewal of bridges and other structures'; 'maintenance of equipment,' 'conducting transportation,' including: 'salaries and wages in the operating department,' 'supplies,' 'car mileage,' 'switching charges,' 'damage for injuries,' 'advertising,' 'outside agencies and commissions'; and 'general expenses.' They would not include: 'taxes,' 'rental of tracks and terminals,' 'interest on bonds,' nor 'balances available for dividends.' These terms, so far as they apply to railroads, have been carefully defined, for the United States at large, by the Interstate Commerce Commission, and for California by our own State Board of Equalization, and in general are fully understood and applied by all more careful accountants. Precisely analogous items are carried in the accounts of almost all public-service corporations, and the accounts can always be segregated under similar divisions.

Rents or Rental Charges Not Included Among Operating Expenses.

Some corporation officers have argued before the Commission that rent is an operating expense and should be deducted before the net earnings are computed. This rests on a fundamental misconception of the purpose of ascertaining net income. If net income is to be used to determine the rate of a tax on gross earnings, such tax to be *in lieu of all taxes on*

> PROPERTY USED IN OPERATION by a corporation, all net income accruing to that property or from its use must be included. All persons readily admit that interest on bonded indebtedness is not an operating expense; if that is the case, rent is not an operating expense. It would have made no difference, so far as this matter is concerned, whether the Southern Pacific built the Lucin cut-off, as it did, with the proceeds of bonds on which it pays a certain sum annually as interest, or had leased that great bridge from some other company, paying the same sum annually as rent. In neither case would the annual payment be an operating expense; in each case it is a return to property" (emphasis by the Commission).

It would be difficult to state more plainly than did the Commission that the gross receipts tax rests on all property used in operations, including leased property. A tabulation, however, of the steps in the rate fixing process may perhaps further illustrate the strict logic of the Commission's statement that no other conclusion is possible. The steps were:

1. Ascertain gross receipts from operations.

2. Subtract from gross receipts expenses of operating and maintaining all *property in use*, but not rents and interest which are costs of the operating company, and which are not costs of operating the property making up the system (*Report of Commission on Revenue and Taxation*, 1906, p. 96). This gives net *operative* earnings, not of the public service corporation as such, but of all the *property* in use, whether leased, owned or howsoever held.*

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*"Since the object of ascertaining the net earnings is to ascertain from them the value of the property, it is obvious that the net earnings should include all things and only such things as belong to the owners of the property, whether they be the stockholders, or the bondholders, or the lessors of property used by the corporation" (*Report of Commission on Revenue and Taxation*, 1906, p. 95).

3. Capitalize (2), thus obtaining the value of the *operative* property. Since the starting point is all gross receipts from operations, and the only deduction in (2) is operating expenses, *exclusive* of interest and rents, the value reached in (3) can be no other than that of *all property used to obtain operative receipts.* It is *impossible to capitalize earnings from leased property, making no deduction for rents, without reaching a value which includes rented property.*

4. Fix the rates of the gross receipts tax so as to make it a fair tax on the value of the property ascertained in (3)*, which includes leased property.

The importance of recognizing the essential and inherent nature of the gross receipts tax as a tax on *property contributing to operating revenues* will, we trust, justify another reference to the controversy before the Commission on Revenue and Taxation regarding the deduction of rents (supra, pp. 30-31). That controversy, as already appears, arose in connection with the determination of net earnings for the purpose of fixing values and from them, the rates of the gross receipts tax. Why should the officers of public utilities have argued for the deduction of rents in determining net earnings? Obviously and solely to obtain lower rates of gross

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*The Commission found that property in general throughout the state paid on an average an annual *ad valorem* tax equal to about one per cent of its true value. It was this figure which the Commission used as a standard of comparison in computing such rates for the gross receipts tax as to make the same approximately "equal" to taxes on property in general (*Report of Commission on Revenue and Taxation*, 1906, p. 99, *et seq.*).

The rates of the gross receipts tax, as adopted in 1910, have since been increased from time to time. In 1921, when the Legislature, along with other increases, increased the percentage tax of telephone companies to its present figure of five and a half per cent (Political Code, section 3664a), it declared in the statute that it was adjusting the rates of the gross receipts tax so as to make the tax burdens under it equivalent to those on property in general throughout the state (Cal. Stats. 1921, pp. 24-25).

receipts taxes. If rents were deducted, there would be lower net earnings and lower net earnings meant a lower valuation of the property on which the gross receipts tax would be laid; consequently, that a lower percentage of gross receipts would be required to yield a fair tax on that value. The Commission rejected the argument of the public utilities for deduction of rents saying (*Report of Commission on Revenue and Taxation*, 1906, p. 96):

> "This rests on a fundamental misconception of the purpose of ascertaining net income. If net income is to be used to determine the rate of a tax on gross earnings, such tax to be *in lieu of all taxes on* PROPERTY USED IN OPERATION by a corporation, all net income accruing to that property or from its use must be included" (emphasis by the Commission).

The controversy about rents involved in its ultimate analysis two contrary conceptions of the gross receipts tax. The Commission regarded the tax as fairly equivalent to a tax on *all property contributing to operating revenues;* the public service corporations argued as though it were equivalent to *an income or earnings tax on themselves.* There is, of course, a manifest difference between a tax measured by *the earnings of a corporation* and a tax measured by *the earnings of all property used by the corporation.* The one excludes leased property; the other necessarily includes it (*Atlantic Coast Line v. Daughton*, 262 U. S. 413, 420), and it was the latter that the Commission on Revenue and Taxation expressly and specifically declared the gross receipts tax to be.

The theory on which the rates of the gross receipts tax were fixed is, of course, an important part of the state law. In *Pullman Co. v. Richardson*, 185 Cal. 484 (Aff. 261

U. S. 330) the court quoted (pp. 504, 506) various passages from the 1906 report of the Commission on Revenue and Taxation which we have quoted and said (p. 504):

> "The tax commission in its report of 1906 to the legislature furnished the proper rate of taxation based on the gross receipts in order to properly tax the property of the various corporations involved in the amendment."

Petitioners refer to the Commission's discussion of rents and leased property, and quote (Petitioners' Br. p. 150) the passage from the 1906 report containing the statement that the gross receipts tax is

> "to be *in lieu of all taxes on* PROPERTY USED IN OPERATION" (emphasis by the Commission).

This language, they say, was used "not for the purpose of showing the rate of final taxation, but to ascertain what the true value of the corporate franchise was" (Petitioners' Br. p. 151). No reference to any passage in the reports of the Commission or other source or authority is or could, we think, be given to support this assertion.

B. The gross receipts tax is essentially a property tax substituted for other taxes on the property which produces gross receipts. It must rest on all property, including leased property, which contributes to the gross receipts.

This State Supreme Court has repeatedly held that the gross receipts tax is a tax substituted for all taxes which were or might have been levied on the same subject matter. The court describes it as a "legal and commutated or substituted tax for other taxes which were or might have been levied" (*Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 425, 143 Pac. 700); as a method "substituted

for the former system" (*San Francisco v. Pacific Telephone & Telegraph Co.*, 166 Cal. 244, 248, 135 Pac. 971); as a "tax substituted and commutated for the different *ad valorem* taxes" (*Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 352, 156 Pac. 502); as "a legal and commutated or substituted tax for other taxes" (*Pullman Co. v. Richardson*, 185 Cal. 484, 489, 197 Pac. 346).

The other taxes for which the gross receipts tax was substituted included license and other charges (*San Francisco v. Pacific Telephone & Telegraph Co.*, 166 Cal. 244, 248, 135 Pac. 971); but the main tax for which it was substituted, was the *ad valorem* property tax. As already pointed out, the Commission on Revenue and Taxation framed the gross receipts tax as essentially a property tax (Report of Commission on Revenue and Taxation, pp. 91, 102, 200, 201), and the State Supreme Court has always so regarded it. Thus, in *Pullman Co. v. Richardson*, 185 Cal. 484, 197 Pac. 346 (aff. 261 U. S. 330), the court said (p. 487):

> "The question as to whether or not the taxes levied by Section 14, Article XIII of the constitution are taxes upon property rather than upon receipts or income has several times been considered by this court and in each instance it has been declared to be essentially a property tax."

See also:

Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 424, 143 Pac. 700;

Payne v. Richardson, 189 Cal. 103, 106, 207 Pac. 547.

Being a property tax, the gross receipts tax must, we submit, rest on all property which contributes to gross receipts. The fallacy of a contrary contention is clearly

shown by assuming the case of a public utility leasing all of the property which it operates. Under the contention of petitioners, the gross receipts tax of such a company would anomalously be a property tax not resting on any property, except possibly going concern value.

So too, the fact that the gross receipts tax is a *substituted* tax necessarily assumes some pre-existing tax for which it was or could have been substituted. But, under petitioners' contention, leased property used by public utilities pays an *ad valorem* tax just as it did when under the former system. There is, therefore, nothing for which that part of the gross receipts tax reflecting earnings from the leased property could have been substituted.

Petitioners argue that, even if a public utility leased all of the property it used, its gross receipts tax would still be a property tax resting upon the going concern value and similar intangible property. There is, of course, no doubt that such intangible property should be and is taxed. It is also obviously true that properties owned by a public utility may be enhanced in value by reason of the fact that they are operated in conjunction with leased properties. But it is equally obvious, we submit, that $1000 worth of owned property cannot be taxed as if it were worth $100,000 simply because it is operated in conjunction with $99,000 worth of leased property.

C. Operative leased property contributes to gross earnings, and, therefore, to gross receipts taxes, in precisely the same way as if owned. If respondents owned the "talking sets" they would pay the same gross receipts taxes as they now pay. The gross receipts tax is, therefore, upon the whole value of property in use.

If respondents owned the "talking sets" involved in this suit, admittedly petitioners could not assess them.

But respondents, in that event, would pay in taxes exactly the amount that they now pay, that is, the same percentage of their gross receipts. That percentage, therefore, necessarily includes the tax on the "talking sets," just as an assessment to a reversioner of the whole value of land includes the value of any outstanding leasehold (*Trimble v. Seattle*, 231 U. S. 683, 689; *San Pedro, etc., R. Co. v. Los Angeles*, 180 Cal. 18, 22-25, 179 Pac. 393).

This was pointed out by the Circuit Court of Appeals. That court said (Tr. p. 46):

> "While courts will not concern themselves with the economic policy pervading a state statute, they may properly consider that in taxing gross receipts upon all operative property in use *there is really a payment of substitution tax upon the whole value of the property in use.*" (Italics ours).

In *Merrill Ry. & Lighting Co. v. City of Merrill*, 119 Wis. 249, 96 N. W. 686, in which it was held that leased property of street railroad companies could not be locally taxed, in view of the statutory provisions imposing a gross receipts tax in lieu of other taxation, the court said (96 N. W. 687):

> "What difference would it make that his power plant had been purchased? Such fact would neither enhance nor diminish the gross earnings of the entire plant, nor the contribution thereto *of this particular property.* Why should the legislators care whether the dynamos in the power house or the motors on the cars were owned or leased? In either case they contribute equally to produce the revenue on which the license fee is graded."

The California Supreme Court, as stated by the Circuit Court of Appeals (Tr. p. 46), has emphasized the importance of *use* in determining whether property is sub-

ject to state or local taxation. In *Pullman Co. v. Richardson*, 185 Cal. 484, 197 Pac. 346, the court said (p. 507):

> "In making the comparisons of values another fact must also be considered, namely, that the gross revenue method includes *all operative property*."

In *San Bernardino County v. State Board of Equalization*, 172 Cal. 76, 155 Pac. 458, the court said (p. 78):

> "The prime requisite for property properly classified as 'operative' is that it shall be used in the conduct of the business of one of the corporations enumerated in subdivision (a) of section 14 of article XIII of the constitution."

D. Local taxation of leased operative property is contrary to the principle of separation of state from local taxation.

Under the principle of separation between the subjects of state and local taxation an obviously important factor, in determining what property the state should tax and what property should be taxed locally, is whether the property is general or local in character.

In the introduction to its 1906 report the Commission on Revenue and Taxation said (p. 6):

> "Every year sees some state or states move in the direction of the separation of state from local taxation as to sources of revenue and the abandonment of the old general property tax as applied to public service corporations whose business is general rather than local in character."

And again, in enumerating the faults in the old system, the Commission said (Report, 1906, p. 10):

> "14. The present system takes the revenue derivable by taxation from large general organizations, like the railroads, which revenue belongs by right to the people of the State at large, and distributes it most

inequitably among the local divisions of the State which have no proper claim to it whatsoever."

In dealing with the subject of separation it said (Report, 1906, pp. 77-78):

"The separation of State from local taxation as to sources of revenue has come to be generally recognized as the one feasible pathway for tax reform.

As this Commission uses the term 'separation of sources' it means that the counties and local governments shall tax only the private or individual real estate and tangible property within their boundaries, property, that is, *which is clearly and distinctly localized*. This class of property has a distinctly local situs and benefits obviously and directly by local government. Upon this class of property there shall ultimately be no State tax. The State, on the other hand, shall tax all those industries, and *classes of property* sometimes called 'corporate' to distinguish them from 'private or individual' industries and properties. * * *

The general, non-local, character of corporate property is so obvious that it seems almost superfluous to argue that the taxes thereon do not belong to the localities. But as this idea is comparatively new in practice it may need illustration. A carload of butter and cheese may be shipped from Humboldt county by water to San Francisco and thence by rail to New Orleans. On its way it will pass through many counties. We should hold it robbery if each county erected tollgates and collected tolls on that carload of Humboldt products. But that is practically what we allow when we permit the counties to tax the railroads.

* * * * * * *

Does the fact that San Bernardino county, Nevada county, and Siskiyou county sit at the gateways through which the railroads enter the State give them a right to tax every yard of cloth, every box of crackers, every plow, and all the other multitudinous wares which the people of this commonwealth bring in? Many counties not situated on the line of any

railroad nevertheless contribute to its traffic. By what right are they to be deprived of the taxes levied on this traffic? If the railroads are taxed by the State alone and for State purposes alone, every dollar of taxable property in the State, whether on the line of the railroad or not, is benefited, for the amount paid into the State treasury from this source lessens the tax on all property in the State.

* * * * * * * * *

Obviously there is a perfectly clear line of demarkation between property local in character which should be subject to local taxation *and property or industries general in character* which should be subject to general or State taxation. (Italics ours).

To accomplish separation it is necessary to define clearly and sharply the boundary line between State and local powers of taxation. This boundary line having been once defined, neither of the two parties shall trespass upon the territory set apart for the other."

The separated system thus contemplates "that the counties and local governments shall tax only * * * property * * * which is clearly and distinctly localized" (*Report of Commission on Revenue and Taxation*, 1906, p. 77), while "property or industries general in character * * * should be subject to general or state taxation" (Report, 1906, p. 78). The State Supreme Court has expressly so held in the case of *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 156 Pac. 502.

It is utterly unreasonable to say that property *owned and used* by public utilities is "general in character" and at the same time to say that property *leased and used* by such public utilities for the same purposes is "clearly and distinctly localized". The case at bar affords a striking illustration on this point. Certainly it cannot be said that the stand of a telephone instrument is general in charac-

ter and subject only to state taxation, but that the receiver of the same instrument "is clearly and distinctly localized" so that the county can tax it. Yet, unless such a proposition can be maintained, there is no escape from the conclusion that local taxation of leased operative property is contrary to the fundamental principle of separation.

Fourth: Section 3665B of the Political Code provides that property used in the telephone business is operative property and not subject to local taxation. Other sections of the code, by necessary inference, are to the same effect.

We have quoted subdivisions "d" and "e" of section 3665b of the Political Code which, in defining property not subject to local taxation, include property "used" in the telephone business (supra, p. 20). These provisions in themselves are, as we contend, and as the Circuit Court of Appeals held (Tr. pp. 45-46), decisive of the case, unless the court holds them contrary to the state constitution.

But section 3665b is not the only section which shows that leased property used by a public service corporation is not taxable locally. By necessary inference subdivision 4 of section 3665a leads to the same conclusion. It provides:

> "Income From Nonoperative Property Not Included.
>
> Income derived from property not defined in this section and in sections three thousand six hundred sixty-four *a*, three thousand six hundred sixty-five *b* and three thousand six hundred sixty-five *c* of this code as operative property *shall not be included in the gross receipts for the purpose of determining the tax on the property and franchises provided for in section three thousand six hundred sixty-four a of this code*" (italics ours).

It should be remembered that the code sections use the words "operative" and "nonoperative" to describe, respectively, property subject only to state taxation and property subject only to local taxation. If, therefore, leased property used in operations, is nevertheless to be regarded as "nonoperative", then necessarily under the express provisions of subdivision 4 of section 3665a respondents would be entitled to deduct from the gross receipts which they report to the State Board such revenues as they derive from the "talking sets."

To permit such deduction, however, would be counter to the theory of the constitution and statutes.

Deductions from gross receipts of revenues from *leased* property in use, as the code would require, if leased property were "nonoperative", could be made only in the face of great practical difficulties. Certainly, no method readily suggests itself for determining how much revenue a telephone company derives from parts of a telephone instrument.

These practical considerations strongly indicate that neither the framers of the constitutional provision nor the legislature intended that the revenues from the operation of leased property should be deducted from gross receipts. One of the important reasons for adopting the gross receipts tax rather than a net earnings tax was to avoid exactly this kind of practical difficulty (*Report of Commission on Revenue and Taxation*, 1906, pp. 91-92). It is, therefore, only reasonable to suppose that the legislature would not have unqualifiedly provided in subdivision 4 of section 3665a for the deduction of income from nonoperative properties, if it had considered leased property as nonoperative.

Fifth: Petitioners treat this case as involving a tax exemption. But the gross receipts tax is a substituted tax; not a tax exemption. Its provisions are to be construed liberally without leaning to the side of the taxing power; not against the taxpayer like tax exemption laws.

Petitioners repeatedly characterize our position as a claim for "exemption" from taxation of the leased "talking sets" (Petitioners' Br. pp. 159-164). The only reason for this, that we can see, is to invoke by suggestion the irrelevant rule that tax exemption laws must be strictly construed against the taxpayer.

It is thoroughly settled that the gross receipts tax is a substituted tax and not a tax exemption; furthermore, that the provisions regarding it are to be construed liberally without leaning to the side of the taxing power.

Thus, in *County of San Bernardino v. State Board of Equalization*, 172 Cal. 76, 155 Pac. 458, the court said (pp. 78-79):

> "Appellant's counsel insists that the statute of 1911 is one providing for an exemption of property from taxation, and that therefore it should be strictly construed. *But the constitutional and statutory provisions for taxing the property of certain corporations by collecting a per centum of their gross earnings is not an exemption. It is merely a change in the method of taxation.* We need not here discuss this matter elaborately, because the origin and purpose of such taxes have been fully considered by this court in an opinion written by Mr. Justice Henshaw, in *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 423, (143 Pac. 700). *The words relieving public service and certain other corporations from local taxation must be given fair and reasonable interpretation 'without any definite leaning to the side of the taxing power.' (City and County of San Francisco v. Pacific Telephone and Telegraph Co.*, 166 Cal. 249, (135 Pac. 971); *Hartford Fire Insurance Co. v. Jordan*, 168 Cal. 270, 285, (142

Pac. 839).) *This court has followed the liberal interpretation given by the Supreme Court of the United States to the Federal Workmen's Compensation Act in classifying instrumentalities which are used in interstate commerce. (Southern Pacific Co. v. Pillsbury,* 170 Cal. 782, (151 Pac. 277).) *A similarly broad and reasonable policy should be followed in deciding questions relating to property which the state claims the exclusive right to tax.* The prime requisite for property properly classified as 'operative' is that it shall be used in the conduct of the business of one of the corporations enumerated in subdivision (a) of section 14 of article XIII of the constitution" (italics ours).

And again (p. 80):

"Even under statutes exempting railroad property from taxation (which according to the authorities must be strictly construed), buildings, repair-shops, and other instrumentalities reasonably incident to the proper and convenient carriage of passengers and commodities are included within the exemption (see 37 Cyc. 918, and cases cited). And there is stronger reason why similar adjuncts to the safe transmission of products requiring refrigeration should be removed from the local taxing power by the constitutional and statutory provisions which we have before us in this case, *because we are bound to give them liberal construction*" (italics ours).

In *San Francisco v. Pacific Telephone and Telegraph Co.*, 166 Cal. 244, 135 Pac. 971, the court said (p. 248):

"The appellant, relying upon the well-settled rule that exemptions from taxation are to be strictly construed (2 Lewis's Sutherland Statutory Constitution, sec. 539), argues that every doubt concerning the meaning of the provision in question must be resolved against the defendant. *But we think the amendment does not grant any exemption, within the meaning of this rule. As we have pointed out, it provides a*

specific mode of taxation, in substitution of certain other modes. In *Merrill Ry. & Lighting Co. v. City of Merrill*, 119 Wis. 249, (96 N. W. 686), the court after recognizing the doctrine of strict construction of exemptions, goes on to say: 'On the other hand, it is equally well settled that, where the statute in terms exempting property from general taxation is only a part of a general statutory scheme imposing a license or other impost in lieu of general taxation, the rule of strict construction has no application, but on the contrary, such a statute is to be construed liberally in favor of the person required to pay taxes in the substituted license form.' To the same effect are the cases of *Milwaukee etc. Ry. Co. v. Board of Supervisors*, 29 Wis. 116; *Milwaukee etc. Ry. Co. v. Milwaukee*, 34 Wis. 271; *Milwaukee E. R. & L. Co. v. Milwaukee*, 95 Wis. 42, (60 Am. St. Rep. 81, 3 L. R. A. 45, 69 N. W. 794), and *Duluth etc. Ry. Co. v. Douglas County*, 103 Wis. 75, 88, (79 N. W. 34). (See, also *Osborn v. New York & N. H. R. Co.*, 40 Conn. 491; *Neary v. Philadelphia etc. Ry. Co.*, 7 Houst. (Del.) 419, 9 Atl. 405, 414, 415; *Jersey City G. Co. v. Jersey City*, 46 N. J. L. 195, 196; Black on Interpretation of Laws, sec. 143). The foregoing quotation states the rule of construction in somewhat broader terms than we find it necessary to adopt here. Whether, in a case like the one before us, the construction should be liberal, *in favor* of the taxpayer, is questionable. But certainly the authorities, and good reasons as well, support the view that in such cases the meaning of the statutory or constitutional provision is to be ascertained by a fair consideration of all its terms, without any definite leaning to the side of the taxing power" (italics by the court).

It is to be noted that in the *San Bernardino* case (172 Cal. 76, 155 Pac. 458), the court decided the question left open in the *Pacific Telephone and Telegraph Company* case—i. e., whether the construction of the laws regarding gross receipts taxes should be "liberal"—and ex-

pressly decided that they *must be given a "liberal construction"* (172 Cal. 80).

The decisions of the State Supreme Court afford many instances in which the foregoing rules of construction have been applied. Thus, in *Hughes v. Los Angeles*, 168 Cal. 764, 145 Pac. 94, the court held that a city cannot levy an occupation tax on insurance agents. The constitution does not expressly forbid such a tax, but the court held it invalid because it would, in practical effect, fall on the insurance companies which pay gross premiums taxes in lieu of all other taxation.

In *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700, it was claimed that the constitution did not forbid a privilege or excise tax on public utilities, and that they should be required to pay license fees upon motor vehicles. The court held, however, that there could be no "privilege tax upon the *property* exclusively used in the operation of the business" (italics by the court; 168 Cal. 430). How much more forcibly does this language apply as against the direct local taxes in the case at bar!

In the *San Bernardino County* case (172 Cal. 76, 155 Pac. 458), the claim was made that a pre-cooling plant of the Pacific Fruit Express Company was not of the same nature as franchises, cars, rolling stock, horses and wagons and other things mentioned in the constitutional provision, so that under the rule of *ejusdem generis* it was subject to local assessment. This contention was overruled, the court emphasizing the broad equitable features of the constitution and statutes, the liberal construction it was bound to give them and the importance of *use* as determining the status of the property.

In *Southern Pacific Co. v. Levee District No. 1,* 172 Cal. 345, 156 Pac. 502, it was argued that the constitution did not prohibit assessments for benefits, and that railroad companies were subject to levee assessments. The court held that the companies were not subject to such assessments, except as specifically provided in the constitution, i. e. for the payment of principal or interest of bonded debts outstanding when the constitutional amendment was adopted (Art. XIII, Sec. 14, Subd. e).

Again, it has been held that telephone companies are not liable for city licenses *(San Francisco v. Pacific Telephone & Telegraph Co.,* 166 Cal. 244, 135 Pac. 971), and that insurance companies subject to state taxation on gross premiums are not liable for a state corporation license tax *(Hartford Ins. Co. v. Jordan,* 168 Cal. 270, 142 Pac. 839). These cases were decided on grounds including the broad and fair construction to be given the substituted tax and the importance of maintaining the separated system of taxation established by the constitutional amendments.

Sixth: The law cannot be construed to permit the double taxation, which would necessarily result if leased operative property of public utilities is subject to local taxation.

Through the varied stages of the litigation over the question here involved, it has always been assumed that petitioners' contention, if sustained, would result in double taxation of leased property used by public utilities.

Petitioners now claim that double taxation would not result, arguing that, because of the way in which the gross receipts tax rates were fixed the leased property is not "taxed through the gross receipts of respondents"

(Petitioners' Br. p. 105). The fact is, that the rates of the gross receipts tax were computed specifically to include a fair tax on leased property used by public utilities (supra pp. 23-24). The Circuit Court of Appeals was, therefore, manifestly correct in holding (Tr. p. 53):

> "that the gross receipts tax is a proper tax on the talking sets and that the levy threatened by the local authorities would result in the imposition of a double tax on the same property * * *".

This, we submit, the laws of the State cannot be construed to allow.

A. Section 3665a of the Political Code prohibits double taxation of property subject to the gross receipts tax, and Section 3607 of the Political Code prohibits double taxation as a matter of general law.

Section 3665a of the Political Code provides in part as follows:

> "Any company *claiming that the levy of the percentage* fixed by section three thousand six hundred sixty-four *a* of this code on the total gross receipts of such company *results in double taxation of the property of such company*, may make application to the state board of equalization for a hearing on such matter. Said board shall have power to take evidence and determine the facts with respect to such claim and in event said board finds the claim of such company to be true, said board may authorize such company to deduct from its reported gross receipts that amount of such receipts which, if included in such total gross receipts, *would cause such double taxation.*" (Italics ours).

Subdivision 4 of section 3665a (quoted supra p. 41), providing that income from nonoperative property (which property is taxed locally) shall be deducted from gross receipts reported for state taxation, was obviously intended to avoid duplicate taxation. Sections 3665c

and 3666, requiring the corporations to report their operative property and the local assessors to protest against the inclusion of any property claimed to be nonoperative, have a like purpose (*Great Western Power Co. v. City of Oakland*, 189 Cal. 649, 657, 209 Pac. 553).

Section 3607 of the Political Code provides in part that

> "* * * nothing in this code shall be construed to require or permit double taxation."

B. As a matter of construction all presumptions are against double taxation. It will only be enforced under express statutory mandate, and will not be permitted in the face, as here, of express statutory prohibitions.

In *Lowry v. County of Los Angeles*, 38 Cal. App. 158, 175 Pac. 702, the court said (p. 164):

> "'In other words, it is a rule of construction, repeatedly recognized by the courts in taxation cases, that double taxation will not be presumed to have been intended, and will only be enforced under express mandate' (Judson on Taxation, sec. 425, p. 543). The decisions of our own state, the leading ones of which we have made reference to, by fair interpretation support this rule."

The foregoing is a thoroughly settled rule (37 Cyc. 755). The same principle has been applied by the state courts in gross receipts tax cases. So, in *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 156 Pac. 502, the court said (p. 352):

> "* * * we not only find the learned commissioners speaking in their reports indifferently of taxation by cities or taxation by counties or 'local taxation,' but we find in every word of their reports that their fundamental idea was that the state, and the state alone, should fully tax for its own purposes by this new method all of the properties of the corporations, which properties, *as a matter of justice to avoid*

double taxation * * * should be absolutely relieved from 'local taxation'" (italics ours).

In the same case the court discussed the provisions under which a public utility, assessed locally for the payment of outstanding bonds (Const. Art. XIII, Sec. 14, Subd. e), may deduct the amount of the local assessment from its gross receipts tax. In that case a levee district assessment had not been made at the time the plaintiff paid its gross receipts taxes to the state. In allowing recovery from the state of an amount equal to the assessment which the plaintiff was later required to pay, the court said (p. 355) that the constitutional amendment does not

> "*countenance for a moment the double taxation which would result if the state was paid the tax in full and the district in turn was paid its tax in full*" (italics ours).

In *Great Western Power Co. v. City of Oakland*, 189 Cal. 649, 209 Pac. 553, the court said with regard to the provisions of the Political Code (sections 3665c and 3666), requiring corporations to report their operative property to the Board of Equalization and requiring the local assessors to protest against the inclusion of any property claimed to be nonoperative (p. 657):

> "It would seem to be obvious that the purpose of these provisions in said act was that of preventing clashes between the state board of equalization and local assessors with respect to what property of such corporations was subject to their respective jurisdictions for the purposes of state or local taxation, *and thus avoiding double taxation*" (italics ours).

In *Pullman Co. v. Richardson*, 185 Cal. 484, 197 Pac. 346, the state court upheld the constitutionality of the

gross receipts tax as against corporations engaged in interstate commerce. The decision was based upon the theory already stated in the earlier case of *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700, that the gross receipts tax was a reasonably close and just equivalent for other taxes which were or might have been levied upon public utilities or their property. In the *Pullman* case the court said, quoting from the *Roberts* case (p. 489):

> "'Without pausing here to review the decisions of the Supreme Court bearing upon the question, but contenting ourselves with a subsequent reference to some of them, it may be said that the conclusions of the Supreme Court were that property used in the public service frequently acquired a value in the use, which value was something greater than the value of the property not engaged in such use; that by the systemization and unification of such properties in use they in the aggregate acquired a special value by virtue of this unity of use; that this special value was in the nature of property; *that a fair tax upon gross earnings bore such a relation to the values of these properties under their unity of use as to justify such a tax upon revenue as being a legal and commutated or substituted tax for other taxes which were or might have been levied* (Citing cases).
>
> 'So much for the justness and reasonableness and legality of the new method * * * .'"

Petitioners concede that the gross receipts tax is designed to "bring about substantial equality between non-utility and public utility holdings" (Petitioners' Br. p. 157) in matters of taxation. This is manifestly impossible if leased property used by public utilities is to be subjected to double tax burdens.

Against the foregoing authorities petitioners cite *Bank of California v. Roberts*, 173 Cal. 398, 160 Pac. 225

(Petitioner's Br. pp. 139-140). This case is discussed in our argument on the constitutional question (infra p. 93-94). We will here only say that the opinion of the state court in the *Roberts* case justified duplicate taxation of shares of bank stock only on the theory that the state constitution expressly and specifically so required (173 Cal. 400, 401). The judgment of the state court was reversed by this court in *Bank of California v. Richardson*, 248 U. S. 476, and under the decision of this court, applying the federal statute (Rev. Stat. Sec. 5219) regarding the taxation of national banks, duplicate taxation was not permitted.

Seventh: Respondents' reply to certain arguments of petitioners with respect to the state law.

A. There is no rigid "scheme of taxation in California * * * that property is taxed to the owner thereof" (Answering Petitioners' Br. pp. 143-144).

Petitioners argued in the Circuit Court of Appeals, as they argue in this court, that local taxation of leased operative property should be permitted under the "general scheme of taxation in California, which they urge is based on the principle that the owners of property shall pay taxes" (Tr. p. 45). In holding this contention "against the real meaning of the amendment and the relevant statutes" (Tr. p. 45), the Circuit Court of Appeals assumed, and, we submit, correctly, that the alleged "general scheme of taxation in California" has too many qualifications to give any weight to petitioners' argument.

Section 8 of article XIII of the state constitution provides:

> "The legislature shall by law require each taxpayer in this state to make and deliver to the county assessor, annually, a statement, under oath, setting

forth specifically all the real and personal property owned by such taxpayer, *or in his possession, or under his control,* at twelve o'clock meridian on the first Monday of March" (italics ours).

Section 3629 of the California Political Code provides:

"The assessor must exact from each person a statement, under oath, setting forth specifically all the real and personal property owned by such person, *or in his possession, or under his control,* at twelve o'clock M. on the first Monday in March. Such statement shall be in writing, showing separately:

1. All property belonging to, *claimed by, or in the possession or under the control or management of such person.*

2. All property belonging to, *claimed by, or in the possession or under the control or management* of any firm of which such person is a member.

3. All property belonging to, *claimed by, or in the possession or under the control or management* of any corporation of which such person is president, secretary, cashier, or managing agent" (italics ours).

Again, section 3635 provides:

"If the owner *or claimant* of any property, not listed by another person, is absent or unknown, the assessor must make an estimate of the value of such property" (italics ours).

Section 3636 provides:

"If the name of the absent owner is known to the assessor, or if it appears of record in the office of the county recorder where the property is situated, the property must be assessed to such name. If unknown to the assessor, and if it does not appear of record as aforesaid, the property must be assessed to unknown owners."

Section 3807 provides:

> "When land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale, or renders it void or voidable."

There are many instances in California in which property is not assessed to the owner, but to the person in possession or control of it. Thus money held in escrow by a title company as agent or trustee for interested buyers or sellers of land under search may be assessed to the title company (*Title Guaranty & Trust Co. v. County of Los Angeles*, 3 Cal. App. 619, 86 Pac. 844).

On the same principle collateral held by banks is often assessed to them. The seller of personal property subject to conditional sale is the owner, but the buyer is customarily and properly assessed for taxation (Political Code, Sec. 3628; see also *Houser & Haines Mfg. Co. v. Hargrove*, 129 Cal. 90, 95, 61 Pac. 660). Personal property may be assessed to an agent in possession or to a trustee (*People v. Home Insurance Co.*, 29 Cal. 533, 547-548). Property consigned for sale from any place out of the state "must be assessed in the county where the property is situated," and the assessment is made to the consignee (Political Code, Sec. 3638).

Land may be assessed to a mere possessor under claim of right (*Christy v. Fisher*, 58 Cal. 256, 259; *Ward v. Matthews*, 80 Cal. 343, 346, 22 Pac. 187), even though he has no title (*Reily v. Lancaster*, 39 Cal. 354, 357). The right of a purchaser of land from the state prior to patent or final payment is subject to taxation (*People v. Donnelly*, 58 Cal. 144, 146). So are possessory rights in

the public lands of the United States (*City of Pasadena v. County of Los Angeles*, 182 Cal. 171, 176, 187 Pac. 418; *San Pedro etc. R. Co. v. City of Los Angeles*, 180 Cal. 18, 23, 24, 179 Pac. 393; *Bakersfield etc. Oil Co. v. Kern County*, 144 Cal. 148, 77 Pac. 892; *People v. Shearer*, 30 Cal. 645, 657, 658).

As a practical matter it is not reasonably open to question, we submit, that taxes in California are primarily on property, not persons, and that the taxing authorities are primarily concerned with collecting them from property, the owner's liability being an incidental matter.

B. It does not follow from the fact that public utilities did not pay taxes on leased property prior to 1910 that the gross receipts tax is not in lieu of local taxes on operative leased property. Before 1910 no part of the gross receipts from the operative leased property was paid in taxes (Answering Petitioners' Br. pp. 144-148).

Prior to 1910 the assessment of property leased and used by public utilities was ordinarily made to the owner and not to the operating utility. Petitioners argue from this fact that the gross receipts tax was not intended to include taxes on such leased property. The framers of the constitutional amendments stated otherwise (supra pp. 30-31).

Furthermore, prior to 1910 no part of the income from leased property used by public utilities was paid in gross receipts taxes. Under the old system, leased property and owned property were taxed alike. Under the present system, if petitioners' contention were sound, owned operative property would be taxed only for state purposes, but leased operative property would be taxed upon its full value for both state and local purposes.

C. The Commission on Revenue and Taxation in its 1910 report did not in any way change the theory for computing rates explained in the 1906 report (Answering Petitioners' Br. pp. 144-158).

Petitioners make some suggestion that the theory on which the rates of the gross receipts tax were fixed, as announced in the 1906 report of the Commission on Revenue and Taxation (see supra pp. 23-34) was modified in the 1910 report. There is no basis for this suggestion. The Commission of 1910 was a continuation of the Commission of 1906, reduced from five to three members by the act of March 25, 1909 (Cal. Stats. 1909, p. 779). As stated in the 1910 report (p. 16),

> "The governor of this state, who is chairman of the commission, believed it advisable that, as the main work of the commission had been completed, and as it was only necessary to show the effect of the proposed amendment in its operation, the commission should be reduced in number, and therefore recommended that the act creating the commission be amended by providing for the appointment of only one commissioner [in addition to the governor and a secretary]. The legislature, therefore, amended that act by an act approved March 25, 1909."

The 1910 report was issued to bring the 1906 report up to date and to reaffirm the commission's sincere belief in the proposed constitutional amendments, which had been defeated in 1908 and were on the ballot of 1910 (when they carried). The amendments of 1910 differ from the proposed amendments of 1908 only in minor particulars.*

As to the theory of fixing the rates of gross receipts taxation, the 1910 report simply referred to the 1906 re-

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*These changes consisted of provisions for a state ad valorem tax, if the new system provided insufficient revenues; provisions making public service corporations liable to local taxation for preexisting bonded indebtedness; and provisions permitting the legislature to increase the rates of the gross receipts tax (*Report of Commission on Revenue and Taxation*, 1910, pp. 12, 13).

port. So, it said (*Report of Commission on Revenue and Taxation*, 1910, p. 19):

> "In explanation of the above rates it may be stated that they are fixed on the theory that these proportions of the gross receipts will in each case equal the average burden of taxation on other classes of property. The method of arriving at the different rates is explained in detail in the 1906 report of this commission."

And again (p. 37):

> "As to the adequacy of the rates of taxation proposed we may refer to the long and detailed discussion of all the points involved which was given in the 1906 report of this commission. Nothing has been brought out in the four years' discussion to lead us to feel that the rates were in any case too low."

In *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057, the court said (186 Cal. 165):

> "The amendment as adopted was fundamentally the same as that proposed by the commission in its report in 1906, and that report may, therefore, be considered in determining the meaning of doubtful provisions."

Petitioners quote from the argument of State Senator J. B. Curtin (Petitioners' Br. p. 152) addressed to the voters in support of the amendments of 1910, underscoring the passages which say that the new system would yield increased revenues from public service corporations. This is exactly what it was contemplated that the amendments would do. One of the main considerations brought out by the Commission on Revenue and Taxation was that the gross receipts tax would furnish a practicable method of reaching franchise and going concern values, which the old system had not reached, thus making public utilities pay a fair tax on their intangible property (Report of

Commission on Revenue and Taxation, 1906, pp. 12-13). This, however, has nothing to do with the contention of petitioners that leased operative property was to be left subject to local taxation.

Neither is there any merit, we submit, in petitioners' suggestion (Petitioners' Br. pp. 157-158) that the argument to the voters explained the theory of gross receipts taxation differently from the Commission on Revenue and Taxation. State Senator Curtin, who prepared this argument, was a member of both the 1906 and 1910 commissions, and would hardly have contradicted his own reports. Furthermore, as the court said in *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 351, 156 Pac. 502:

> "Of the purpose of the framers of this new taxation measure, and of the intent of the people in adopting it, there is fortunately not the slightest doubt. The state had appointed a learned commission on revenue and taxation, whose labors extended over many years. In 1906 they promulgated their first report. In 1910 they put forth their second report. *These reports were most widely distributed, at the state's expense, with the avowed purpose of educating its people to a knowledge of the reasons why the change in the method of taxation of public service corporations*, banks, insurance companies, etc., was deemed most desirable, and to an understanding of the benefits which would follow the adoption of the new method" (Italics ours).

Petitioners also quote a passage from the special report of the State Board of Equalization of 1912 (Petitioners' Br. p. 154). In this report, however, the board said that the gross receipts tax rates had been computed to yield a fair tax upon

> "A theoretical value for the property and franchises *in use*" (Petitioners' Br. p. 154).

Petitioners quote from page 18 of the 1910 report of the Commission on Revenue and Taxation (Petitioners' Br. p. 156):

> "The taxes reserved for the state are:
>
> (1) On the operative *property* of railroad companies, etc.
>
> * * * * * * * * *
>
> (4) On the *property* of telegraph and telephone companies, etc."

This quotation merely begs the question which is whether "operative property", on which all taxes are reserved for state purposes, does not include leased property.

The quotation, moreover, is only a half quotation. The Commission was not enumerating property subject to taxation, but was giving a schedule of rates. The complete quotation is as follows (*Report of Commission on Revenue and Taxation*, 1910, p. 18):

> "The taxes reserved for the state are:
>
> (1) On the operative property of railroad companies, including street railways, at the rate of four per cent of their gross receipts annually.
>
> * * * * * * * * *
>
> (4) On the property of telegraph and telephone companies at the rate of three and one-half per cent of their gross receipts annually."

Petitioners conclude their argument as to the proposed intention of the framers of the constitutional amendments by saying that the arguments addressed to the voters "were simply concerned in securing more taxes from the public utility corporations" (Petitioners' Br. p. 158). That one of the purposes of the new tax was to increase the tax contribution of public service corporations is true;

but it cannot be said, as petitioners' argument seems to imply, that any construction of the gross receipts tax law is permissible if it increases the taxes of public utilities, and that any claim on behalf of the public utility is necessarily wrong.

D. The word "their", as used in the state constitution, cannot be construed to limit the "in lieu" clause to owned property (Answering Petitioners' Br. pp. 158-164).

Petitioners argue that the gross receipts tax rests solely on owned property because the state constitution provides that telephone companies shall pay the gross receipts tax upon "*their* franchises * * * poles, wires * * * and other property or any part thereof used exclusively in the operation of their business in this state" (Cal. Const. Art. XIII, Sec. 14).

The word "their" may, of course, import ownership. With equal correctness and precision it may, however, import possession. It may be and often is used to describe leased property. A man can correctly say "my house", although he leases the house. Where the question is whether a railroad is liable under the Federal Employers' Liability Act "its" track includes leased track (*Campbell v. Canadian Northern R. Co.*, 124 Minn. 245, 144 N. W. 772, 773). Where the legislature empowers incorporators to build a dam on "their own land", it can be built on leased land (*Parker v. Cutler Milldam Co.*, 20 Me. 353, 356-357). When the Commission on Revenue and Taxation said (Report 1936, p. 77) that public utility industries are general and "belong to the people of the state as a whole, not to any particular community in which by accident *their* rails, wires, or offices may be", it obviously did not mean to limit its statement to *owned* rails, wires or offices.

Whether "their franchises * * * poles, wires * * * and other property or any part thereof used exclusively in the operation of their business in this state" includes leased property must, we submit, be determined from all the circumstances. As against the construction contended for by petitioners we oppose a construction which as a matter of etymology is just as permissible and which, we submit, every consideration touching the gross receipts tax imperatively demands. We have shown that the framers of the constitutional provisions said that the gross receipts tax rests on leased property used in operation; that the rates were fixed to include a fair tax on such leased property; that local taxation of leased operative property is inconsistent with the system of separated state and local taxation; that the statutes of the state provide that property *used* in the telephone business is not subject to local taxation; that the gross receipts tax laws are to be construed fairly and liberally to equalize tax burdens. Against these circumstances, we submit, no argument of any weight can be predicated upon the mere word "their". The Circuit Court of Appeals so held (Tr. p. 45).

We point out further that Section 3665b of the California Political Code is a codification of Section 8 of the Act of April 1, 1911 (Cal. Stats. 1911, pp. 530, 534), which was passed to put Section 14 of Article XIII of the state constitution into effect. The framers of the statute and of the constitutional amendment were the same. The statute, now set out in the code, describes property subject to state taxation as "*the* * * * property", not "*their* * * * property", used in operation.

It is, we think, unnecessary to discuss the cases cited by petitioners with respect to the word "their" (Petitioners' Br. pp. 161-164). Without exception these cases deal with tax exemptions of schools, religious institutions, etc. Such cases, we have already shown, have nothing to do with the gross receipts tax, which is not a tax exemption (supra pp. 43-46).

E. Contemporary construction of the constitutional provisions show that the gross receipts tax rests on all operative property, including leased property (Answering Petitioners' Br. pp. 165-169).

Petitioners claim that section 3668c of the Political Code, which makes the gross receipts tax "a lien upon all the property and franchises of every kind and nature belonging to the companies subject to taxation for state purposes", shows that the gross receipts tax rests solely on owned property. This argument, it seems to us, involves an entire misconception of the code section. That section was not intended to define property subject to state taxation. Such a definition appears in section 3665b, where it includes all property used in operation. Section 3668c is clearly intended not to limit this definition, but to extend the gross receipts tax lien to nonoperative property. In other words, a railroad might have investments or other holdings not used for railroad purposes, which, therefore, would not contribute to the gross receipts tax. It was the plain purpose of section 3668c to provide that such property should be subject to the lien of the gross receipts tax.

The best contemporary construction of the constitutional provisions, we submit, is in the report of the Commission on Revenue and Taxation, already quoted, and in

the Statute of 1911, which was drawn by the framers of the constitutional provisions (Cal. Stats. 1911, pp. 530,534).

F. The fact that leased property is not included in the service rate base of public utilities does not tend to show that the same is subject to local taxation. In ascertaining net revenue to fix service rates, rents are deducted as operating expenses. No deduction was made for rents in fixing the rates of the gross receipts tax (Answering Petitioners' Br. pp. 110-120).

Petitioners make much of the familiar fact that leased property is not included in the service rate base of public utilities. Any analogy, however, to be drawn from such rate making necessarily points to an exactly opposite conclusion from that for which petitioners contend.

In service rate making rent is deducted as an operating expense in ascertaining net revenue for valuation purposes. Service rates are computed to yield a fair return on property *owned* by the operating company, because leased property has had its return in the form of rent. But, in fixing the rates of the gross receipts tax no allowance was made for rents; on the contrary the rates were computed to yield a fair tax on values ascertained by capitalizing the earnings of all property in use, including leased property (supra, pp. 23-34).

G. There is no decision of the Supreme Court of California, inferentially or otherwise, supporting the contention of petitioners (Answering Petitioners' Br. pp. 170-180).

We have already replied to petitioners' claim that this case is controlled on points of state law by the opinion in the *Pacific Telephone* case (Petitioners' Br. pp 176-181). We have also referred to the case of *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700 (Petitioners' Br. pp. 170-171). That case, held that public

service corporations paying gross receipts taxes need not pay licenses on motor vehicles used in operation. The opinion in that case, furthermore contains the statement that the gross receipts tax is equivalent to a fair tax on all property *in use* (supra, p. 51).

In *Pacific Gas & Electric Co. v. Roberts*, 176 Cal. 183, 167 Pac. 845 (Petitioners' Br. p. 172), the court held that an electric company must pay its state tax upon receipts from all sales of electricity, without deducting amounts paid in the purchase of electricity from other companies. This decision is in strict accord with the theory of the gross receipts tax. Due allowance for expenses of this kind was made in the calculation of the rates of the tax. Under the principles by which these rates were fixed, the cost of such electricity would be deducted to obtain net earnings, from which the value of the property is calculated, on which in turn the rates of the gross receipts tax are computed (see *Report of Commission on Revenue and Taxation*, 1906, pp. 95-96). That value includes, as it should, the intangible value to the purchasing company of dealing in the purchased electricity. That value is property like any other property and should be justly taxed. It is because proper provision has been made for matters of this kind in fixing the rates of the tax, that the tax is ordinarily required to be paid on gross receipts without deduction (Political Code, Sec. 3665a; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 456).

In *Union Tank Line Co. v. Richardson*, 183 Cal. 409, 191 Pac. 697, the car company, which leased cars to an oil company, was held to be a car-loaning company "operating upon railroads in this state", and therefore liable for the gross receipts tax (Cal. Const., Sec. 14 of

Art. XIII). Petitioners say that this case represents the "converse of our situation" (Petitioners' Br. p. 175). This statement is obviously not accurate. The only question involved in the *Union Tank Line* case was the liability of the car company for a gross receipts tax. Had local authorities endeavored to tax the leased cars for their full value at the same time that the state was collecting a gross receipts tax from the rent of the cars, the case would have been parallel to the case at bar.

Eighth: There is no direct authority for the construction which petitioners put on the state law. Opposed to it are decisions from Wisconsin, Illinois and New Jersey.

The decision of the Circuit Court of Appeals is in line with every decision in which, so far as we have found, questions similar to that here presented have arisen. Most of these are cited by the Circuit Court of Appeals, but for convenience of reference we shall quote from the opinions.

In Wisconsin, for example, a statute imposed a gross receipts tax on street railways, and provided that all property "*owned* and actually and necessarily used by such * * * corporation in the operation of its business, shall be exempt from taxation and other license fees" (96 N. W. 686). In *Merrill Railway etc. Co. v. City of Merrill*, 119 Wis. 249, 96 N. W. 686, the city assessed a tax on land leased to a street railway. The railway joined with the lessors in a suit to declare the tax void. Notwithstanding that the statute only relieved property "owned" by street railways from local taxation—obviously narrower language than that in the California constitution and statutes—the court set aside the tax. After pointing out that (as in California) the purpose of the

statute was to provide a broad and equitable scheme of state taxation, the court said (96 N. W. 687):

> "In the light of these rules for construction, then, we have to consider whether the Legislature can in reason be supposed to have used the word 'owned' in so general a sense as to be satisfied by a leasehold right for a term of five years. The purpose of this whole scheme was to measure the contribution of street railways to the public revenues by the earning capacity of their plants as entireties, recognizing that such plants include many elements which are peculiarly intangible and difficult of valuation by ordinary methods, such as the franchises to do business; the privileges to use highways and public grounds; the questionable title to the structures affixed to such realty and consequent difficulty of valuation specifically; the uncertainty, if not absence, of sale value of each element of the plant, except as used in connection with every other part, and in connection with the special franchises and privileges. It seems to us entirely probable that the Legislature intended in a general way to exempt from specific assessment and taxation those things which, in association with each other, help to produce the gross revenue on which the license fee is to be measured. *In this view it is difficult to see what leased property should not fall within the purpose of the exemption as readily as that owned absolutely, while actually used for the purposes of the enterprise. What difference would it make that his power plant had been purchased? Such fact would neither enhance nor diminish the gross earnings of the entire plant, nor the contribution thereto of this particular property. Why should the legislators care whether the dynamos in the power house or the motors on the cars were owned or leased? In either case they contribute equally to produce the revenue on which the license fee is graded.* A further consideration arises out of the general public policy that the entire plant should not be subject to enforced disintegration or severance by process of law. This policy has been so emphatically declared, and the reasons for it so fully explained,

> that we need only refer to its existence. * * * Other considerations might be urged, but those suggested are sufficient to show that the use of the word 'owned' in a sense to be satisfied by a leasehold is not so unreasonable as to be unwarranted under the rule of liberal construction which must guide us" (italics ours).

After the decision in the *Merrill* case Wisconsin established an income tax, but exempted from it railroad companies which, as above noted, pay gross receipts taxes. In *City of Superior v. Allouez Bay Dock Co.*, 166 Wis. 76, 164 N. W. 362, the defendant leased to a railroad a dock used to transfer ore from cars to boats. Local officers imposed on the dock company an income tax measured by the rents. The court in holding that the dock was railroad property and that the tax was invalid, said (164 N. W. p. 364):

> "The argument is fallacious. When a railroad operates a terminal itself, or when a terminal is owned by a third person or corporation and operated solely as a terminal for the railroad, it is as truly a part of the railroad as its trains, and its business as truly a part of the railroad business as the operation of the trains. No reason is perceived why, for the purposes of taxation, such property should not be classified as railroad property and subjected to the same methods of taxation."

In Illinois, a statute required railroad companies to file with the State Board of Equalization sworn schedules of their tracks and gave the Board exclusive power to assess such tracks (100 N. E. 956-957). In *People ex rel. Abt, County Collector v. Wiggins Ferry Co.*, 257 Ill. 452, 100 N. E. 956, a railroad company reported part of its right of way which it held under lease from the defendant, and paid the tax assessed by the State Board (100 N. E.

957). The local assessor assessed the land to the defendant as owner of the reversion and obtained judgment against the defendant for local taxes. This, of course, resulted in taxing the land twice, just as, under petitioner's contention in the case at bar, the "talking sets" would be taxed twice. The Supreme Court of Illinois reversed the judgment for local taxes saying (100 N. E. 958):

> "The mere fact that the appellant owned the fee, and the railway company was in possession of this tract of land, under a lease or otherwise, did not authorize the local assessor to assess the right of way. Real estate used by a railway company for right of way is 'railroad track' for the purposes of assessment, and is assessable only by the State Board of Equalization even though the railroad company is a tenant by sufferance or has a lease, and the title to the land is owned by another corporation or individual."

People v. Illinois Northern R. Co., 248 Ill. 532, 94 N. E. 37, involved the same statute. There, too, a local assessor had assessed the lessor upon leased property covered by the lessee's return to the State Board of Equalization. The court said in reversing a judgment for local taxes (94 N. E. 40):

> "We think it is too clear for argument, in view of the statute and the adjudicated cases, that a railroad company's right of way must be assessed as a unit; that the only assessing body which can assess such right of way is the State Board of Equalization; that such board is given full power to assess real estate owned or operated by a railroad company as right of way; and that the jurisdiction of the State Board of Equalization is exclusive over the class of property designated by the statute as 'railroad track' for assessment purposes, whether held by a railroad company in fee or for years, or otherwise. In other

words, that the use to which the property is devoted, and not where the fee title rests, determines which of the assessing bodies—that is, the State Board of Equalization or local assessor—shall assess property in use by a railroad company for right of way purposes."

Likewise, in New Jersey, where the statute (Act of 1888, Secs. 1, 2 and 3; Comp. Stats. of 1910, Secs. 445, 446, 477) provides that "all property of any railroad or any canal company used for railroad or canal purposes" shall be assessed by state assessors, and that other property shall be assessed and taxed by local authorities, it has been held that land leased to a railroad company and used for railroad purposes is subject to assessment by the state and not by the city. In the case of *In re Pennsylvania R. Co.*, 49 Atl. 543, the Supreme Court of New Jersey decided that question in the following brief opinion:

> "The assessment is upon lands leased to the Pennsylvania Railroad for 20 years, which is used for railroad purposes. It is subject to assessment by the state board, and not by the city of Hoboken. (Citing cases.) The assessment by the city should be set aside."

See also

Wisconsin Electric Power Co. v. Town of Lake, 186 Wis. 199, 202 N. W. 195;

People ex rel. Wood, County Collector v. Terre Haute etc. R. Co., 256 Ill. 591, 100 N. E. 173;

State v. St. Paul Union Depot Co., 42 Minn. 142, 43 N. W. 840, 842;

City of Detroit v. Detroit Manufacturers' R. Co., 149 Mich. 530, 113 N. W. 365.

Of the foregoing cases the *Merrill* case (supra, p. 65) is so closely in point that petitioners do not try to distinguish it. The later Wisconsin cases, as well as the cases from Illinois and New Jersey, of course, arose under statutes differing from the California statute, but they are, we submit, clearly and closely analogous.

On the basis of the considerations so far advanced, the Circuit Court of Appeals held that local taxation of leased operative property of corporations subject to the gross receipts tax is invalid under the state law. This conclusion, we submit, was just and right.

II.

THE TAX IN DISPUTE IS VOID UNDER THE STATE LAW, BECAUSE RESPONDENTS INCLUDED THE LEASED "TALKING SETS" IN THE REPORTS OF THEIR OPERATIVE PROPERTY TO THE STATE BOARD OF EQUALIZATION AND THE COUNTY ASSESSOR FILED NO PROTEST AGAINST SUCH INCLUSION.

There is, we submit, a further and particular ground, besides the rules of general application already referred to, on which the tax in dispute is invalid under the state law. Respondents included the "talking sets" in the reports of their operative property which they were required to file with the State Board of Equalization (Bill of Complaint, Tr. p. 7; Testimony of A. J. Reed, p. 27). The defendant assessor did not protest against this inclusion of the "talking sets". This, under the law, if he claimed that the "talking sets" were nonoperative property, he should have done. His failure in this regard

alone renders his attempted assessment of the "talking sets" null and void.*

Section 3665c of the Political Code, after providing for the filing of reports with the State Board, requires each corporation to

> "furnish a duplicate of the report covering so much of said property as is located in any county, city and county, municipality, or district, to the assessor of the county, city and county, city or district, in which such property is located".

Section 3666 provides as follows:

> "NOTICE BY ASSESSOR OF PROPERTY REGARDED NONOPERATIVE. HEARING. 1. If any assessor finds in the report of the operative property in his county, city and county, municipality, or district, furnished to him by any of the companies as required in section three thousand six hundred sixty-five *c* of this code, any piece or parcel of property which he regards as nonoperative property, or partially operative and partially nonoperative, he shall, within thirty days after receiving such report, notify the state board of equalization thereof by mail, which notice shall contain a general description of the property and the assessor's reasons for regarding the same as nonoperative property. He shall also mail a copy of the notice to the company whose property is involved. The said board shall investigate the nature of the property and its use, and, if an agreement between the said board, the assessor, and the company as to the proper classification of such property cannot be reached, then the said board shall, under such rules of notice as it may deem reasonable, set a date for a hearing, at which the assessor and the company may be present or represented. At such hearing the board shall, from the evidence presented and from the best information it can obtain decide the matter in dispute, and determine whether such property is operative or nonoperative or in what

* This point was not considered in the *Pacific Telephone Company* mandamus case (supra p. 21).

proportion operative and in what proportion non-operative. The said board shall enter its decision in its minutes, and shall send a copy thereof to the county assessor and the company, and also to the proper officer of any municipality affected thereby. Said decision shall be binding upon all parties, the state, the county, city and county, municipality, or district, and the company, unless set aside by a court of competent jurisdiction, and each such assessor must note the decision on his assessment-roll, and must assess such property accordingly."

In *Great Western Power Co. v. City of Oakland*, 189 Cal. 649, 209 Pac. 553, an assessor attempted to assess locally property included by a public service corporation in its report to the State Board. There, as in the case at bar, the assessor had made no objection to the report. The trial court sustained a demurrer to the plaintiff's complaint to recover taxes paid under protest on the local assessment. The state Supreme Court, in reversing the judgment, held that the failure of the assessor to object to the report rendered the assessment void. The court said (189 Cal. 654-659):

"The respondent herein in support of the action of the trial court sustaining its demurrer to the plaintiff's complaint and of the judgment based thereon, makes three main contentions. First, that the said steam heating plant of the plaintiff is not 'operative property' within the intent and meaning of the foregoing provisions of the constitution providing for state taxation of property of gas and electric companies 'used exclusively in the operation of their business', and hence is the proper subject of local taxation. Second, that the terms of the statute above set forth providing that when the assessor finds in the report which the corporation has made to the state board of equalization and of which he has been furnished a copy, any piece of property which he regards as nonoperative property or as partially operative and partially nonoperative property, he

shall, within a specified period notify the said board and said corporation of his reasons for regarding the same as nonoperative property, * * * *which notification shall cause said board to institute an investigation into the nature and use of said property upon the hearing of which it shall be determined by said board whether such property is operative or nonoperative property, which determination shall be binding upon all parties,* is a merely permissive proceeding on the part of said assessor and that his failure to pursue the same is a mere irregularity which did not render the tax in question void. Third, that if such procedure is not merely permissive in so far as the assessor is concerned, the provision of the statute requiring it is unconstitutional and void.

As to the first of these contentions it may be said that * * * it is nevertheless a question which is not presented to this court for final determination in this case; and this by reason of the conclusion we have arrived at with respect to the second contention of the respondent herein as above set forth. * * * It would seem to be obvious that the purpose of these provisions in said act was that of preventing clashes between the state board of equalization and local assessors with respect to what property of such corporations was subject to their respective jurisdictions for the purposes of state or local taxation, and thus avoiding double taxation; and this is made even more apparent by the succeeding provisions of section 10 of said act which provided for an investigation by the board of equalization to be held for the purposes of determining whether the property in question is or is not operative property and which further provides that such determination when made 'shall be binding upon all parties, the state, the county, city and county, municipality or district, and the company, unless set aside by a court of competent jurisdiction; and each such assessor must note the decision on his assessment-roll and must assess such property accordingly'. In view of the foregoing express provisions of section 10 of the act of 1911 we are constrained to hold that the contention of the respondent is not well founded. * * * This court

has, in substance, held otherwise in the case of *Pacific Electric Railway Co. v. Rolkin*, 164 Cal. 156 (128 Pac. 20), in construing those very provisions of the act in question. In that case the failure of the city assessor of Los Angeles to file with the state board of equalization within the time prescribed in said act, his protest against the taxation of the property in question in that case as operative property of the Pacific Electric Railway Company, was held jurisdictional and a later filing of such protest by him ineffectual to prevent the said board from placing such property upon its roll as operative property; and that its action in so doing was as valid as if no such belated protest had been filed. *In harmony with these views we now hold that the failure of the assessor of the city of Oakland to file with the state board of equalization the required notice of his claim that the property in question was unoperative property of the plaintiff was jurisdictional in so far as his right to thereafter claim that said property was unoperative property, so to assess the same locally as such was concerned. His subsequent action in attempting to assess said property as unoperative property of such corporation was not, as the respondent contends, a mere irregularity, but on the contrary was an attempt to levy a local assessment upon property of the corporation, the status of which had, under the procedure provided in said act, been fixed for that fiscal year as operative property thereof, subject only to state taxation. The attempt of the assessor to thereafter subject the same to local taxation was therefore utterly void.* The respondent, however, contends that in so doing so as to render the act of 1911 unconstitutional as permitting the assessment of unoperative property by the state board of equalization and as relieving such property from local taxation. This contention, however, begs the question at issue by assuming that the property in question is unoperative property, an assumption which can not be made by the assessor or his principal, the respondent herein, after the valid assessment of such property as operative property by the state following the failure of said assessor to protest that same to the

state board of equalization by filing the notice and protest required by law" (italics ours).

Upon remission of the foregoing case to the trial court the defendant county answered, claiming that the company had only furnished the assessor with a "copy" of its report to the State Board and not a "duplicate", as required by section 3665*c* of the Political Code. A judgment of the trial court upholding this contention was also reversed by the State Supreme Court, which in its opinion reaffirmed the ruling in the previous case. It said (*Great Western Power Co. v. City of Oakland*, 196 Cal. 121, 139, 236 Pac. 307):

> "As he (i. e., the assessor) did not take the steps provided by law whereby he might have subjected the property in question to assessment for local purposes, if it were in fact not operative property of the appellant, he was without jurisdiction to make an assessment thereon (*Pacific Electric Ry. Co. v. Watkins*, 164 Cal. 156 (128 Pac. 20)). It follows, therefore, that the City was without jurisdiction to levy and collect any tax based upon such invalid assessment. This last conclusion we take now to be the law of the case, for it was in effect held on the former appeal in this case (*Great Western Power Co. v. City of Oakland*, *supra*, at pp. 657, 658) that the procedure prescribed by the code not having been followed, the attempt of the assessor to subject the property to local taxation was utterly void."

In the case of *Pacific Electric Ry. Co. v. Watkins*, 164 Cal. 156, 128 Pac. 20, which is cited in the *Great Western Power* cases, the court held that a protest of the local assessee is void if it is filed late. The court said (164 Cal. 158):

> "The city assessor of Los Angeles did not file any protest against the taxation of the property in question

> as operative property of the Pacific Electric Railway Company until more than thirty days after he had received the copy of the company's report which the law requires to be served upon him. The provision of the statute (Stats. 1911, p. 538) that such protest shall be filed within thirty days thereafter is jurisdictional. A protest filed later has no effect, and does not require the state board to revise or alter its action in placing such property on the roll as operative property, or to dispose of the protest in any way."

Petitioners argue that "no report of the 'talking sets' was made at all to the State Board of Equalization, except in so far as they might be included under the item * * * 'instruments'" (Petitioners' Br. p. 141). The fact is, as established by undisputed evidence (Tr. pp. 26-27), that the reports were made on forms furnished by the Board of Equalization and were made in such detail as was prescribed by the Board (Political Code, Sec. 3665; also Plaintiffs' Exhibits 1, 2, on file by stipulation as original exhibits (Tr. p. 34)). Respondents reported their instruments, of which the "talking sets" were integral parts. The "talking sets" were not specifically mentioned, any more than any other parts of the instruments, because the Board did not so require (Tr. pp. 26-27; see forms of reports furnished by the Board, Plaintiffs' Exhibits 1 and 2). A telephone instrument includes the receiver, transmitter and induction coil, just as much as a telephone pole includes the cross-arms, brace, insulators, clamp, anchors, guy wires and insulators upon it (Tr. p. 27).

Petitioners go outside the record to say that the copies of the reports furnished to the assessor were insufficient to require him to file a protest, because previously "these respondents and utilities generally had appeared in the

user plus ownership test laid down by petitioner assessor as to what constituted 'operative property' " (Petitioners' Br. pp. 142-143). The fact is that no claim was ever made by any assessor in any of the fifty-eight counties of California that the leased "talking sets" were subject to local taxation until petitioners made that claim in 1925.

III.

THE TAX IN DISPUTE IS INVALID UNDER THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

We have shown that the rates of the gross receipts tax were fixed to include a fair tax on all operative property of telephone companies including leased property, and that the local tax in suit on the full value of the leased "talking sets" would be a double tax burden (supra pp. 23-34). This, we contend, the state law should not be construed to permit. If, however, the state law were so construed, then, we contend, the collection of the local tax would violate the Fourteenth Amendment.

As will appear, the gist of our argument on this point is not the double tax burden, in and of itself, but the multiform discrimination which it would make against respondents and which, we contend, is based on no reasonable ground or classification.

Before discussing the separate matters of discrimination we call attention to certain authorities on the general principle involved; also to the authorities showing that in California no other leased property is subjected to two property taxes on its full value.

First: Preliminary considerations.

A. Unreasonable and arbitrary discrimination in matters of state taxation not based upon reasonable grounds of classification violates the Fourteenth Amendment.

In *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, the court said, quoting from the case of *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352 (p. 445):

> "'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'"

In *Union Tank Line Co. v. Wright*, 249 U. S. 275, the court said (p. 282):

> "We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (*Western Union Telegraph Co. v. Massachusetts*), and the average amount of property habitually brought in and carried out by a car company (*American Refrigerator Transit Co. v. Hall*). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both."

See also:

Road Improvement District No. 1 v. Missouri Pacific R. Co., 274 U. S. 188, 191;

Southern R. Co. v. Kentucky, 274 U. S. 76, 82-84;

Hanover Ins. Co. v. Harding, 272 U. S. 494, 508, 516;

Schlesinger v. Wisconsin, 270 U. S. 230, 239-241;

South Utah Mines and Smelters v. Beaver County, 262 U. S. 225, 231;

Bethlehem Motors Co. v. Flynt, 256 U. S. 421, 426;

Barbier v. Connolly, 113 U. S. 27, 31.

This rule, of course, does not bind the states to an iron-clad rule of equality in taxation (*Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232). Neither does it, of itself, invalidate double taxation (*Shaffer v. Carter*, 252 U. S. 37, 58). It does, however, demand equal treatment for persons similarly situated, and forbids discrimination not based on reasonable grounds of classification. So, in *Atchison etc. R. Co. v. Vosburg*, 238 U. S. 56, the court said (p. 59):

> "The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation."

And in *Gulf etc. R. Co. v. Ellis*, 165 U. S. 150, the court said (p. 155):

> "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

And again (pp. 159-160):

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. • • • No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

B. The local tax is on the full value of the "talking sets". The gross receipts tax rates were fixed to include a fair tax on the full value of the same property. No other leased property in California is taxed for its full value to both lessor and lessee.

No property in California is taxed at its full value to both the lessor and lessee. The general practice in making assessments for *ad valorem* taxes is to assess the entire value of leased property against the owner of the reversion and to make no assessment against the lessee. All tangible property in the state is taxed either locally under the *ad valorem* plan or through the substituted property taxes paid under section 14 of article XIII of the state constitution.

In *San Pedro etc. R. Co. v. City of Los Angeles*, 180 Cal. 18, 179 Pac. 233, the court said (180 Cal. 22):

> "'It is true that the code makes no specific provision for separate assessments of leasehold and reversion to the lessee and the owner of the fee, respectively. The usual procedure in this state, as elsewhere, has been to assess the entire value of the land to the owner of the reversion. Such assessment covers the value of the leasehold as well as of the reversionary interest, the sum of the two being comprised in the value of a complete ownership of the land. (*Gramm Oil Co. v. Santa Barbara*, 155 Cal. 149 (20 L. R. A. (N. S.) 211, 99 Pac. 483).) The state thus receives the tax upon every interest in the land, and the requirement of the constitution and of Section 3627 of the Political Code is satisfied.'"

See also:

Fraser's etc. Pier v. Ocean Park Pier Co., 185 Cal. 464, 468, 197 Pac. 328, 198 Pac. 212;

Pacific Wharf & Storage Co. v. County of Los Angeles, 180 Cal. 31, 179 Pac. 398;

Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 99 Pac. 483.

In case where, for special reasons, assessments for *ad valorem* property taxes are made to lessees they are for the valueof the leasehold interest only.

In *Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 99 Pac. 483, the court held it proper to assess an oil lease separately from the reversion. Oil leases, the court said, give the right to take the substance of the soil, and since the thus differ from ordinary leases there is sound reason for assessing the interest of the lessee and the owner separately. This, however, involved no double tax burden. The assessment against the lessee, as the trial court has specifically found, was for $14,950, the value of the leasehold only, and against the lessor for $66,450, the value ofthe reversion. The State Supreme Court said (155 Cal141-142):

> "We understand this finding to mean that there was no double assessment or double taxation upon the same property or interest therein, and we assume therefrom that the valuation of the entire estate and property in the land, as made by the assessor, including the plaintiff's rights and privileges, would exactly equal the aggregate amount of all the assessments levied."

After mentioning the general rule that there is ordinarily "but one assessment of the entire estate in the land, and that this assessment should include the value of

Second: The taxation of the leased "talking sets" locally for their full value, as well as for their full value through the gross receipts tax, arbitrarily discriminates against respondents in ways not justified by any reasonable classification.

A. The collection of the local tax would discriminate against respondents in favor of all other lessees in the state not paying a gross receipts tax.

The added burden of the local tax on the "talking sets", in addition to the substituted gross receipts tax already paid by respondents, would be a manifest and heavy discrimination against them in favor of all other lessees in the state not subject to the gross receipts tax.

On this point petitioners will no doubt argue, as they have argued before, that, inasmuch as the local tax is assessed against the American Telephone and Telegraph Company, respondents are not harmed. Such an argument ignores the substance of things.

If leased property of public utilities is fairly taxed like other property in the state, it is not important whether the lessor or the lessee pays the tax or whether their separate interests in the property are separately assessed (*Trimble v. Seattle*, 231 U. S. 683, 689; *San Pedro etc. R. Co. v. City of Los Angeles*, 180 Cal. 18, 22, 179 Pac. 393). Respondents resist the threatened collection of the local tax on the "talking sets", because they have already paid a substituted tax on the whole value of the sets. And where, as here, if petitioners' contention is sound, property leased by respondents for use in the telephone business must, by reason of the mere fact that respondents lease it, bear twice the tax burden of other leased property in the state, then respondents must ultimately bear the added burden, no matter to whom it is assessed.

If double taxation is a necessary incident to leasing property to a public service corporation paying a gross receipts tax, but not a necessary incident of leasing it to any one else, economic law inexorably requires that the public utility bear the added burden.*

The constitutionality of a state tax law depends upon its practical effect (*St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 348; *St. Louis etc. R. Co. v. Arkansas*, 235 U. S. 350). In the case last cited the court said (p. 362):

> "But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

The necessary and unescapable effect of the local tax, we submit, is to discriminate against respondents in favor of other lessees in the state who do not pay a gross receipts tax. The local tax cannot, therefore, be sustained, unless the discrimination rests upon a reasonable classification.

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*It should perhaps be added that respondents could not obtain any relief by recovering the part of their gross receipts taxes which represents taxes on the leased "talking sets". The state law requires the gross receipts tax to be paid on gross receipts without deductions "for any purpose whatsoever, except such refunds as arise from errors or overcharges" (Political Code, Sec. 3665a). Besides, the gross receipts taxes have already been paid, and since the petitioning assessor filed no protest against the inclusion of the "talking sets" in respondents' reports of property subject only to state taxation (*supra* pp. 7071), there was no opportunity for respondents to ask the Board of Equalization to make allowances to avoid double taxation (Political Code, Sec. 3665a). The discrimination can be removed only by invalidating the local tax, just as in overvaluation cases it can only be removed by reducing the discriminatorily high assessment, not by raising the assessments, which are too low (*Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 445; *Chicago etc. R. Co. v. Kendall, Governor, et al.*, 266 U. S. 94, 98).

On this question petitioners say that our contention is that there is no proper ground for classification between property leased by a public utility and property owned by a public utility (Petitioners' Br. p. 37, et seq.). This involves a misconception of our position. The discrimination which would exist here, and which we contend is not permitted is between respondents as lessees and all other lessees in the state. In connection with petitioners' statement of our position we may here add, however, that we have found no case holding that property, merely because it is leased, can be classified differently from property of the same kind which is not leased, and can so be doubly taxed. Indeed, in most cases where leasehold and reversion have been separately assessed, the courts have been at pains to point out that the assessments on the two did not exceed the value of the property (supra, pp. 80-82). In *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, the Minnesota gross receipts tax law was involved. The plaintiff, a freight line company, suing to recover gross receipts taxes paid under protest, claimed that the taxes were unfair because the earnings of its cars were included in the receipts upon which the railroads paid gross receipts taxes, and were further subject to the gross receipts tax of the plaintiff. The court answered this contention, not by saying, as petitioners argue here, that such a double tax burden would be permissible, but by saying (p. 456):

> "In valuing the property on which the railroads are taxed the amount of the rental is deducted from their earnings. This plainly discloses a purpose to avoid taxing the same property twice or at more than its value, measured by what it earns."

The real question of classification on the present subject is, we submit, not as between leased property and owned property, but as between lessees who are public utilities, subject to the gross receipts tax, and all other lessees in the state. We submit that classification on this basis for the purpose of imposing a double tax burden on the former class is not permissible.

Under the settled rule of this court, if the property of respondents were taxed on an *ad valorem* basis, they would be entitled to relief if state assessing authorities discriminated against them by overvaluing their leased property.

In *Raymond, Treasurer of Cook County v. Chicago Traction Co.*, 207 U. S. 20, the Illinois statute provided for *ad valorem* taxes on real and personal property. Capital stock was classed as personal property and was to be valued by the State Board of Equalization at its cash value under a fair method, to be decided by the Board, after deducting the value of the company's tangible property. At the time the general practice throughout the state was to assess property at approximately seventy-five per cent of its value and to impose taxes on one-fifth of this amount. The State Board ascertained the value of the plaintiff's stock in this way and assessed a tax for the year 1900, which was paid. Then a taxpayer's suit was brought in the state court and a writ of mandamus issued, requiring the Board to revalue the stock on the basis of its full cash value. This was done and resulted in a large increase in the plaintiff's tax. The increase was certified to local officers, the town tax collector and county treasurer, for collection. The court granted an injunction against a distraint to collect the tax, on the

ground that the proceedings violated the Fourteenth Amendment. In affirming the judgment this court said (pp. 35-36):

> "The provisions of the Fourteenth Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state. *Chicago, Burlington & Quincy R. R. v. Chicago*, 166 U. S. 226. Following the above case the Federal courts throughout the country have frequently reviewed the action of taxing bodies when under the facts such action was in effect the action of the state, and therefore reviewable by the Federal courts by virtue of the provisions of the amendment in question. See *Nashville &c. Ry. v. Taylor*, 86 Fed. Rep. 168; *Louisville Trust Co. v. Stone*, 107 Fed. Rep. 305. In the last case, which related to enjoining the collection of alleged illegal taxes by reason of discrimination, the court said: 'It may be conceded that, if the allegations of the bill are made out, there exists, in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by taxing officers of the state, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the Fourteenth Amendment.'"

The *Raymond* case was followed on the above point in *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441,

445, and has been repeatedly approved in cases holding that a claim of unreasonable and systematic discrimination by state officers in assessing property for state taxes presents a *bona fide* claim under the Fourteenth Amendment which will support jurisdiction based on a federal question (*Bohler v. Callaway*, 267 U. S. 479; *Chicago etc. R. Co. v. Kendall, Governor, et al.*, 266 U. S. 94, 98; *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 508; *Louisville & Nashville R. Co. v. Greene*, 244 U. S. 522, 526).

The foregoing cases, we submit, are direct authority for the principle that the imposition of more burdensome property taxes on property of public utilities than are imposed on similar properties of other persons cannot be justified on the ground of classification.

In *Washington Water Power Co. v. Kootenai County*, 270 Fed. 369, cited with approval by this court in *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 445, the Circuit Court of Appeals for the Ninth Circuit said (270 Fed. 374):

> "Having seen that the assessment of property other than public utilities was intentionally made by local assessors upon a valuation of 50 per cent. of cash value, but the property of the appellant, a public utility, was deliberately assessed by the state authorities upon a basis of 75 per cent. of actual value, we are met with the question whether appellant is entitled to injunction against the excess over which the general property of the state was assessed. Whether or not the state board of equalization assessed other utilities upon the basis of 75 per cent. of actual value is not vital in the present instance, because if the state board, knowing of the intentional assessment of property generally on a 50 per cent. value, assessed the property of appellant on a 75 per cent. basis, *the fact that they may have assessed*

other public utilities upon a like basis cannot defeat the right of appellant to relief" (italics ours).

The situation in the case at bar, we submit, differs in no essential respect from the foregoing cases. The gross receipts tax is essentially a property tax (supra pp. 34-35). If in the administration of the ordinary property tax the state cannot discriminate by systematic overvaluation against property of public utilities, it should not be allowed to bring about a like discrimination by valuing leaseholds as fees through the collection of the gross receipts or substituted property tax, and at the same time permitting local assessment of the full value of the leased property.

We, of course, fully recognize the thoroughly settled right of the state to classify public utilities for taxation by different methods than other persons. Sound reason and authority also go to show that reasonable privilege and excise taxes can be imposed on public utilities which are not imposed on other persons. But from the standpoint of property taxes, and the gross receipts tax is a property tax—the property of public utilities is no different from other property. There is no more reason for discriminating between property of public utilities and other property in the matter of property taxes than there is, for example, in taxing foreign and domestic insurance companies at different rates on personal property (*Hanover Fire Ins. Co. v. Harding, Treasurer*, 272 U. S. 494); or in discriminating in the matter of license taxes against corporations not having three-fourths of their property invested in the state or in state bonds (*Bethlehem Motors Corporation v.*

Flynt, Sheriff, 256 U. S. 421); or in taxing foreign corporations on their property in a way imposing heavier burdens than on domestic corporations carrying on similar business (*Southern Railway Co. v. Greene*, 216 U. S. 400); or in classifying foreign corporations for license tax purposes on the mere number of their authorized non-par shares (*Air-way Corporation v. Day*, 266 U. S. 71, 85); or in classifying stockyard companies for purposes of regulation and rate-fixing merely on the basis of the volume of business done (*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79); or in requiring foreign corporation plaintiffs to submit to an adversary examination before answer which is not required of non-resident individual plaintiffs (*Kentucky Finance Corporation v. Paramount Auto Exchange*, 262 U. S. 544); or in requiring railroads to pay attorneys' fees or costs not imposed on adverse litigants (*Gulf etc. R. Co. v. Ellis*, 165 U. S. 150; *Atchison etc. R. Co. v. Vosburg*, 238 U. S. 56).

The cases cited by petitioners have, we submit, no bearing on the question before the court. *St. Joseph etc. R. Co. v. Steele*, 167 U. S. 659 (Petitioners' Br. p. 33), involved no constitutional question. The question there was whether a railroad bridge was subject to local taxation under the laws of Kansas. Federal jurisdiction was invoked on the ground that Congress had given the original builders of the bridge a franchise to charge tolls. Such a franchise manifestly would not exempt the bridge from taxation.

Oliver Iron Mining Co. v. Lord, 262 U. S. 172 (Petitioners' Br. p. 45) involved an occupation tax as to which, of course, the states have wider latitude in selecting subjects for taxation than in property taxes (262 U. S. 179).

The Minnesota statute (quoted 262 U. S. 174-175) imposed a charge upon persons engaged in mining iron ore equal to six per cent. of the value of the ore extracted after deducting operating costs and royalties. Most of the opinion dealt with the question, answered in the negative, whether the tax was a burden on interstate commerce. The matters decided under the Fourteenth Amendment were:

1. To impose the tax on all *operators* of iron mines, including owners and lessees, involved a proper classification. To exclude contractors not producing on their own account and persons engaged in development work as distinguished from production, is reasonable (262 U. S. 179-180).

2. The claim that to permit a deduction for royalties discriminates against owners in favor of lessees need not be decided where it affirmatively appears that during the period in question no mines were operated by owners (262 U. S. 179-180).

In the case at bar there is no such situation. The discrimination here claimed is between respondents as lessees of the "talking sets" and all other lessees in the state not paying a gross receipts tax. The court will, we think, take judicial notice of the obvious fact that there are lessees in California other than corporations paying a gross receipts tax. (See *McLean* v. *Denver etc. R. Co.*, 203 U. S. 38, 51; *Petit* v. *Minnesota*, 177 U. S. 164, 168; *Minnesota* v. *Barber*, 136 U. S. 313, 321.) In the case last cited the court said (136 U. S. 321):

> "If a fact, alleged to exist, and upon which the rights of parties depend, is within common experi-

ence and knowledge, it is one of which the courts will take judicial notice."

The possible discrimination involved in the allowance by the Minnesota statute of deductions for royalties was removed by a later Minnesota statute which required owners of mines to pay a similar tax on royalties received from their lessees. This statute was sustained in *Lake Superior Mines v. Lord*, 271 U. S. 577 (Petitioners' Br. p. 48). The matter decided under the Fourteenth Amendment was that since ore lands are a distinct class of property the occupation tax might be levied upon operators of ore mines without being extended to the operators of quarries and forests.

It seems to us that these cases clearly do not support petitioners' position in the case at bar.

In *Pacific Express Co. v. Seibert*, 142 U. S. 339, (Petitioners' Br. p. 43), the court held that a state might impose a gross receipts tax upon express companies operating under contract with other carriers, and at the same time tax railroad companies doing an express business over their own lines by a different method. The decision rests on the obvious differences between the business of a railroad company and an express company.

Bank of California v. Roberts, 173 Cal. 398, 160 Pac. 225 (Petitioners' Br. pp. 40, 42, 140), arose as follows: Under the separated system of taxation in California a tax for state purposes is levied upon bank stock in lieu of other taxes upon the shares of stock and the property of the bank, except local taxes on real estate. Though the tax is on the stock and against the shareholders, the banks are obliged to pay it. The Bank of California was a national bank, which owned shares of stock in the Mission State

Bank and in the Mills National Bank. It was taxed as a stockholder of both these institutions. In fixing the value of the Bank of California stock so that it could be taxed, the State Board of Equalization declined to deduct the value of its holdings in the other two banks. The bank paid under protest the taxes on its stock, and sued to recover the amount by which they would have been decreased had such deductions been made. The state court held that the state constitution forbade the making of the deductions claimed (173 Cal. pp. 400-401). It pointed out that if the ruling resulted in double taxation no other ruling was possible under the state constitution, and that double taxation, if based upon reasonable classification, is not contrary to the federal constitution (pp. 402-403). On appeal to this court the judgment was reversed. This court held (*Bank of California* v. *Richardson*, 248 U. S. 476; *Bank of California* v. *Roberts*, 248 U. S. 497), that (1) the Bank of California as a national bank was not taxable at all as a stockholder of the state bank, and (2) that in valuing the stock of the Bank of California for the purpose of making an assessment against its stockholders, the value of the shares in the Mills National Bank, on which the Bank of California, as a stockholder of the Mills bank had already paid a tax, must be deducted. This decision was based on section 5219 of the Revised Statutes, dealing with the taxation of national banks. The Fourteenth Amendment was not considered. Since, under the decision of this court, the state's claim of right to impose duplicate taxation was denied and no question of classification was considered, the *Roberts* case clearly does not in any way support petitioners' arguments on the constitutional questions in the case at bar.

B. The collection of the local tax would discriminate against respondents in favor of public utilities operating leased property, such as water companies and ferries, which, under the state law, pay no gross receipts tax.

The gross receipts tax is not paid by all public utilities in California (Cal. Const. Art. XIII, Sec. 14). For example, neither ferry companies (*Southern Pacific Company v. Richardson*, 181 Cal. 280, 184 Pac. 3) nor water companies (Cal. Const. Art. XIII, Sec. 14) are subject to it. The considerations showing that the collection of the local tax in suit would unreasonably discriminate against respondents in favor of lessees in general throughout the state, show even more clearly that the discrimination against respondents in favor of lessees who are public utilities not paying the gross receipts tax is unreasonable.

C. The collection of the local tax would discriminate against respondents in the taxation of their owned property in favor of all public utilities operating less or no leased property.

Petitioners argue that the gross receipts tax rests only on the *owned* property of public utilities paying the tax and from this erroneous assumption they further argue that no discrimination against respondents in the taxation of their leased property is possible.

Such an argument obviously changes the situation only in form of statement. It does not change the practical effect by which the constitutionality of the tax in suit must be measured (*St. Louis etc. R. Co. v. Arkansas*, 235 U. S. 350, 362). Moreover it necessarily leads to the conclusion that the collection of the local tax would seriously discriminate against respondents in the taxation of their *owned* property, in favor of all public utilities operating less or no leased property. This, we think, can be readily and clearly shown.

If the gross receipts tax rests only on property owned by public service companies subject to the gross receipts tax, the proportion between that tax and the value of the *owned* property thereby taxed will necessarily vary according to the amount of property leased. If a corporation derived large revenues from leased property its gross receipts tax would be wholly disproportionate to the value of its owned property; it might, indeed, equal or exceed the value of such property.

The discrimination can be shown by putting in tabular form a case of two public utilities whose business is in all respects the same, except that one company leases half its properties.

	Utility owning half and leasing half its properties	Utility owning all its properties
Value of all property operated, tangible and intangible	$1,000,000	$1,000,000
Value of property leased	500,000	None
Value of property owned	500,000	1,000,000
Gross receipts	350,000	350,000
Gross receipts tax (@ 5½% (in round figures)	20,000	20,000
Ratio of gross receipts tax to value of property on which paid	20,000 : 500,000 = 4%	20,000 : 1,000,000 = 2%

Thus, under petitioners' theory, the company leasing half the property operated pays, in the form of its gross receipts tax, a tax on the property which it owns at twice

the rate paid by the company operating no leased property.

Likewise, the gross receipts tax on a corporation operating a large amount of leased property could be, and in the case of many public service corporations no doubt would be, equivalent to a tax on the property which they own at a rate many times greater than the rate paid by any other property in the state.

Petitioners will no doubt criticise the foregoing tabulation as involving a "hypothetical case". It is, on the contrary, an illustrative representation of actual conditions. There can, we think, be no question that if, as petitioners contend, the gross receipts tax rests solely on owned property, the proportion between the burden of that tax and the value of the property taxed will vary with the amount of property leased; in other words, the more property a public utility leases and operates, the heavier will be the burden of the gross receipts tax on the property which it owns. Petitioners in asking the court to disregard the discrimination to which this condition would subject respondents as being merely theoretical, are in reality asking the court to assume, contrary to the fact, that there is no public utility in California which leases less property than respondents.

Third: To impose the double tax burdens for which petitioners contend, in the face of the statutory provisions expressly forbidding double taxation, would deny respondents the equal protection of the laws.

It is, we think, a recognized rule that double or unequal taxation imposed in the face of state laws forbidding it is a denial of the equal protection of the laws,

even though the double or unequal taxation might not be so unreasonable as in itself to violate the Fourteenth Amendment. In other words, if the state law confers rights in addition to the minimum required by the Fourteenth Amendment, the "equal protection of the laws" provision guarantees the additional rights which the state has given.

In *Johnson v. Wells Fargo & Co.*, (8th C. C. A.) 214 Fed. 180, affirmed 239 U. S. 234, the court had before it a provision of the constitution of South Dakota (quoted 239 U. S. 237-238), which required all taxes in the state to be uniform on all real and personal property according to its value in money, so that every person should pay a tax in proportion to the value of his, her or its property, and further, that the legislature should provide for the assessment of the property of corporations, as near as might be, by the same methods as provided for assessing taxes on individual property. The state levied a gross receipts tax on express companies. There is, of course, nothing in the Fourteenth Amendment to make such a tax inherently bad (*United States Express Co. v. Minnesota*, 223 U. S. 335). The Circuit Court of Appeals for the Eighth Circuit, in reversing the decree of the District Court dismissing the plaintiff's bill, held that, while the tax would have been in and of itself permissible under the Fourteenth Amendment, the tax was unlawful because the state constitution forbade unequal taxation. It was obviously on the theory that the tax law would deprive the plaintiff of the equal protection of the state constitutional provision that the court further said (214 Fed. 188):

"The record has convinced us that they (the taxes) are unjust, and excessive, that they are irregular and unlawful, but they are also unconstitutional and void, and their collection would constitute a taking of the property of the plaintiffs without due process of law, in violation of the national constitution, and the action of the board in making the assessments and levying the taxes was either a gross mistake equivalent to a fraud or an actual fraud, and mistake and fraud are immemorial grounds of equity jurisdiction."

In affirming the judgment this court said (239 U. S. 242):

"The stringent provisions of the constitution of South Dakota, then in force, required the adoption of a rule of valuation, as near as might be, of like character in assessing individual and corporate property in the state, and here, the record shows, the valuation of the property of the express companies was based principally upon their gross incomes, determined by the method already described. Such administration of the statute would be illegal, although the law upon its face be unobjectionable. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390."

In *Louisville & Nashville R. Co. v. Bosworth, et al.*, 230 Fed. 191, the ruling of which was reviewed by this court in *Greene, Auditor of Kentucky, et al., v. Louisville & Interurban R. Co.*, 244 U. S. 499, 503, the court said (230 Fed. 208):

"And in the case of Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, Mr. Justice Bradley said that the Fourteenth Amendment was not 'intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways.'

But, if the constitution of the state forbids unequal taxation, the legislative department in enacting tax laws has no right to make a discrimination, and, as stated, if in such a case it does discriminate, I see no

reason why its action would not be in violation of the Fourteenth Amendment as well as of the state constitution. Thereby the equal protection of the laws of the state would be denied, and by reason of the constitution of the state the right to discriminate which might otherwise exist has been taken away."

See also:

Railroad & Telephone Companies v. Board of Equalizers, 85 Fed. 302, 317.

The statutes of California expressly forbid *double taxation* (supra, pp. 48-49). Section 3607 of the Political Code provides in part,

"* * * nothing in this code shall be construed to require or permit double taxation."

The code section goes much further than to prohibit merely "unequal" taxation. In so many words it forbids double taxation.

Petitioners argue that the state constitution requires double taxation of the leased "talking sets", and that any statutes of the state forbidding double taxation are nullities so far as they are concerned (Petitioners' Br. p. 29). This argument, we submit, is unsound. It is not claimed that the state constitutional provisions regarding the gross receipts tax have repealed Section 3607 of the Political Code. The fact that the state might perhaps repeal it is not material; at the present time it is a valid law giving general protection through the state. If the effect of the state constitutional provisions is to deny to respondents the protection of the statute as petitioners claim, the conclusion seems to us unescapable that respondents are thereby denied the equal protection of the laws.

IV.

THE SUIT WAS WITHIN THE JURISDICTION OF THE DISTRICT COURT.

Petitioners' argument that the bill of complaint does not raise a federal question, and so is insufficient to establish jurisdiction, is directed to show that respondents have no substantially meritorious claim under the federal constitution. No criticism, as we understand petitioners' position, is made of the bill from the standpoint of pleading. It specifically alleges that the threatened acts of petitioners would infringe the rights of respondents under the Fourteenth Amendment (Tr. pp. 9-10). It alleges the facts on which the constitutional arguments of respondents are predicated. Of matters of state law (*Lamar v. Micou*, 114 U. S. 218, 223), and of matters of common knowledge (supra, p. 92), this court takes judicial notice and such matters need not be pleaded (*Hull v. Burr*, 234 U. S. 712, 720).

It is conceded that the constitutional claims of respondents, as set out in the bill of complaint, are advanced in good faith (Petitioners' Br. p. 11). The mere statement of them, involving as they do the double tax burden on the leased "talking sets", with its necessarily resulting discrimination against respondents, is in itself, we submit, sufficient to show that the constitutional claims are not frivolous or made simply as a pretense to give jurisdictional color to the complaint, but that, on the contrary, they are substantial, and, if necessary to be determined, present, to say the least, meritorious questions arising under the Fourteenth Amendment. Had they been lacking in all semblance of merit, it is safe to say that the Circuit Court of Appeals would not have entertained the

appeal, much less decided that the District Court had jurisdiction which it was bound to exercise (Tr. pp. 48-50, 53).

First: The substantial claim made in good faith that the collection of the tax in suit would violate respondents' rights under the Fourteenth Amendment raises a federal question and establishes federal jurisdiction even though the constitutional claim might not be decided, or might not be sustained on its merits.

In *Greene, Auditor of Kentucky et al. v. Louisville & Interurban R. Co.*, 244 U. S. 499, and companion cases, the plaintiffs were Kentucky public service corporations. They sued the members of the Kentucky Board of Valuation and Assessment and the Attorney General of the state and his assistants in the United States District Court for an injunction against the certification and enforcement of state franchise taxes (pp. 501-502). The plaintiffs alleged that the defendants had discriminated against them by assessing their franchises at a higher rate than that used in assessing similar property. There was no diversity of citizenship. Plaintiffs relied for jurisdiction on a claim under the Fourteenth Amendment; they also claimed that the threatened action of the defendants violated the state constitution. The defendants contended that the court had no jurisdiction. In overruling this contention this court said (p. 508):

> "The contention of plaintiffs, set forth in their respective bills of complaint, that the action of the Board of Valuation and Assessment in making the assessment under consideration and the threatened action of defendants in respect of carrying those assessments into effect constituted action by the State, and if carried out would violate the equal protection provision of the Fourteenth Amendment, *presents, without question, a real and substantial controversy*

under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the federal court, irrespective of the citizenship of the parties" (italics ours).

In *Raymond, Treasurer of Cook County, Illinois v. Chicago Traction Co.*, 207 U. S. 20 (supra, pp. 87-88), where jurisdiction of the federal court was similarly invoked, this court said (p. 35):

> "The claim that the action of the State Board of Equalization in making the assessment under consideration was the action of the State, and if carried out would violate the provisions of the Fourteenth Amendment to the Constitution of the United States, by taking property of the appellee without due process of law, and by failing to give it the equal protection of the laws, *constitutes a Federal question beyond all controversy*" (italics ours).

To the same effect are the following cases, in each of which jurisdiction rested on the contention that the collection of a particular state or local tax would be in violation of the Fourteenth Amendment:

Chicago etc. R. Co. v. Kendall, Governor et al., 266 U. S. 94, 97-98;

Wilson, County Collector of Taxes v. Illinois Southern R. Co., 263 U. S. 574, 575-576;

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445;

Louisville & Nashville R. Co. v. Greene, Auditor et al., 244 U. S. 522, 528;

Waggoner v. Wichita County et al., 298 Fed. 813, 820 (Aff. 5th C. C. A., 3 F. (2d) 962; Aff. 273 U. S. 113);

Bank of Arizona v. Howe, Commissioner et al., 293 Fed. 600, 606-607;

Gammill Lumber Co. v. Supervisors, etc., 274 Fed. 630, 631, 632;

Louisville etc. R. Co. v. Bosworth, Auditor et al., 230 Fed. 191 (same case, 209 Fed. 380, 381, 450-451);

Mayor etc. v. Central R. Co. (3rd C. C. A.), 212 Fed. 76, 82-83 (Aff. 199 Fed. 237, 242);

Louisville Trust Co. v. Stone, Auditor et al. (6th C. C. A.), 107 Fed. 305, 309.

Other cases holding that a *bona fide* claim, that threatened action of state or local officers would violate constitutional rights, raises a federal question, are:

Railroad Commission of Minnesota v. Duluth St. R. Co., 273 U. S. 625, 628;

Terrace v. Thompson, Attorney General et al., 263 U. S. 197, 214;

Cuyahoga Power Co. v. City of Akron, 240 U. S. 462;

Phoenix Railway v. Geary, Corporation Commissioner et al., 239 U. S. 277, 281;

Home Telephone Co. v. City of Los Angeles, 227 U. S. 278;

Siler et al., Commissioners v. Louisville etc. R. Co., 213 U. S. 175, 190-191;

Ex parte Young, 209 U. S. 123, 143-145.

It is, under the settled rule of this court, not necessary that the constitutional claim be sustained on its merits in order to sustain the jurisdiction. In *Moore v. New York Cotton Exchange*, 270 U. S. 593, this court said (pp. 608-609):

"Whether the objection that a bill of complaint does not state a case within the terms of a federal

statute challenges the jurisdiction or goes only to the merits, is not always easy to determine. The question has been recently reviewed at some length by this court in *Binderup v. Pathe Exchange*, 263 U. S. 291, 305, and the distinction pointed out as follows:

'Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. (Citing cases.) In that event the claim of federal right under the statute, is a mere pretence and, in effect, is no claim at all.'

Here, facts are set forth in a serious attempt to justify the claim that the federal statute has been violated; and, while we hold them to be insufficient to sustain the claim, we are not prepared to say that they are so obviously insufficient as to cause it to be without color of merit and, in effect, no claim at all. We think there is enough in the bill to call for the exercise of the jurisdiction of a federal court to decide, upon the merits, the issue of the legal sufficiency of the allegations to make out the claim of federal right."

See also:

Harrison v. Chamberlin, 271 U. S. 191, 195 (Claim "is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to

be plainly without color of merit, and a mere pretense");

Binderup v. Pathe Exchange, 263 U. S. 291, 305-306 (Quoted in *Moore v. New York Cotton Exchange*, supra);

Hart v. Keith Exchange, 262 U. S. 271, 274 ("It is not necessary to draw the line between the foregoing and other cases brought * * * to assert a claim under the Constitution that have been ordered to be dismissed below because 'absolutely devoid of merit,' * * * beyond confining the latter to those that are very plain. * * * The * * * case should be decided upon the merits unless the want of jurisdiction is entirely clear");

The Fair v. Kohler Die Co., 228 U. S. 22, 25 ("* * * if the claim of right were frivolous, the case might be dismissed").

The logic of the general rule that a substantial claim of right asserted under the laws or constitution of the United States is enough to establish jurisdiction is, we think, well illustrated by petitioners' argument on this subject. Their "fundamental premise", they say, is

> "that a bill of complaint which alleges the invalidity of a tax * * *, which tax would be valid under the fourteenth amendment if authorized by the fundamental law of the state, * * * fails to state a federal question" (Petitioners' Br. p. 54).

Such, however, is not the complaint in the case at bar. On the contrary it distinctly avers that the tax in dispute, if authorized by the law of the state, would be contrary to the rights of the respondents under the Fourteenth Amendment. Petitioners are, in reality, arguing here, just as they argued below, that the federal court should defeat its

jurisdiction by assuming that respondents' constitutional claim is without merit (*Cuyahoga Power Co. v. City of Akron*, 240 U. S. 462 and cases cited supra, pp. 105-106).

In *Corrigan v. Buckley*, 271 U. S. 323, 329, and in the other cases cited by petitioners in this connection (Br. pp. 21-23) the claim of federal right was held to have been frivolous, and we may add, in nearly all of them, because the claim asserted had been previously denied by repeated decisions (*Zucht v. King*, 260 U. S. 174; *Brolan v. United States*, 263 U. S. 216; *Hendricks v. United States*, 223 U. S. 178; *Equitable Life Assurance Society v. Brown*, 187 U. S. 308; *McGilvra v. Ross*, 215 U. S. 70).

Second: The collection of the tax in dispute would be action of the state within the meaning of the Fourteenth Amendment, and within the jurisdiction of this court, even though respondents claim that the tax is invalid under the state law. On this point the case of Barney v. New York, 193 U. S. 430, relied on by petitioners, has been overruled.

Petitioners, in arguing that their threatened action in collecting the tax is not action of the state (Petitioners' Br. p. 53) confuse, we think, two distinct things, one a suit against a state within the meaning of the Eleventh Amendment and the other, state action within the meaning of the Fourteenth Amendment. It is settled that a suit to enjoin wrongful action of state officers is not a suit against the state prohibited by the Eleventh Amendment (*Ex parte Young*, 209 U. S. 123, 150, 155; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165; *Truax v. Raich*, 239 U. S. 33, 37; *Greene, Auditor of Kentucky et al. v. Louisville & Interurban R. Co.*, 244 U. S. 499, 506-507; *Public Service Co. v. Corboy*, 250 U. S. 153, 159).

It is equally well settled that action by a state officer, under the color of state authority, is state action within the meaning of the Fourteenth Amendment, against which the federal courts have jurisdiction to protect. So, in *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, the court said (p. 507):

> "The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which as enacted by the state legislature are in themselves unconstitutional. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390, was a case not of an unconstitutional statute, but of confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute. The court, by Mr. Justice Brewer, said: 'Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the State, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual'."

In the *Raymond* case the court said (207 U. S. 35-36):

> "The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State. *Chicago, Bur-*

lington & Quincy R. R. v. Chicago, 166 U. S. 226. Following the above case the Federal courts throughout the country have frequently reviewed the action of taxing bodies when under the facts such action was in effect the action of the State, and therefore reviewable by the Federal courts by virtue of the provisions of the amendment in question."

To the same effect are:

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441;

Standard Scale Co. v. Farrell, 249 U. S 571, 577;

Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350;

Louisville & Nashville R. Co. v. Greene, Auditor et al., 244 U. S. 522, 528;

Illinois Central R. Co. v. Greene, Auditor et al., 244 U. S. 555, 559-560;

Home Telephone Co. v. Los Angeles, 227 U. S. 278, 287;

Ex parte Young, 209 U. S. 123, 155-160.

The petitioning officers, however, say that they are county officers, not state officers, and, therefore, claim that they are not acting for the state (Petitioners' Br. pp. 63-64). But they hold office by virtue of the state law (see California Political Code, Sec. 4230 et. seq.). Their duties are defined by the Political Code and in the levy and assessment and collection of taxes they proceed under the general law. A county is a body politic and corporate (Political Code, section 4000); it is "a governmental agency or political subdivision of the state" (*County of San Mateo v. Coburn*, 130 Cal. 631, 636, 63 Pac. 80; *Dillwood v Riecks*, 42 Cal. App. 602, 607, 184 Pac. 35).

This court has repeatedly held that under such circumstances local officers are state officers, whose action is state action under the Fourteenth Amendment. So, for example, in the *Raymond* case (207 U. S. 20) the defendants, who were enjoined from collecting taxes, were the town tax collector of North Chicago and the county treasurer of Cook County. In *Wilson v. Illinois Southern R. Co.*, 263 U. S. 574, the defendants, against whom an injunction was granted, were tax collectors of five Illinois counties. In *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, the defendants included taxing authorities of Dakota County. In *Home Telephone Co. v. City of Los Angeles*, 227 U. S. 278; *Cuyahoga Power Co. v. City of Akron*, 240 U. S. 462, and *Old Colony Trust Co. v. Seattle*, 271 U. S. 426, it was held that injunctions might be granted under the Fourteenth Amendment against municipal officers.

The petitioners further argue that since respondents contend that the tax in suit is invalid under the state law, they cannot claim that the collection of it would be an act of the state. On this point they rely on *Barney v. New York*, 193 U. S. 430. Although the *Barney* case was later overruled by this court in *Home Telephone Co. v. City of Los Angeles*, 227 U. S. 278, we will refer to it because of the emphasis which petitioners place upon it.

The *Barney* case involved a suit to enjoin the City of New York and its Board of Rapid Transit Commissioners from proceeding to construct a railroad. The plaintiff alleged that the road was being constructed contrary to the law of New York, in that a change in plans had been made without the approval required by the statute; further, that the continued construction would deprive the

plaintiff, an abutting owner, of his property without due process of law, in violation of the Fourteenth Amendment. This court affirmed a decree dismissing the bill for want of jurisdiction, saying (p. 437):

> "Thus the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction."

If this decision had not been overruled, it would require a plaintiff, who contended that action of administrative officers violated both the state law and the federal constitution, to exhaust his remedies in the courts of the state before asking federal relief, because, unless and until the highest authority in the state should hold the action in question valid under the state law, there would, according to the *Barney* case, be no *state* action of which the plaintiff could complain. In other words, a plaintiff who claimed a violation of both his state and federal rights, would have an initial remedy in the state court only.

In the *Raymond* case, the facts of which have been stated (supra, pp. 87-88), the plaintiff's bill specifically alleged that the taxes sought to be enjoined were contrary to the uniformity provisions of the Illinois constitution and statutes, but the court retained jurisdiction and granted relief regardless of the *Barney* case, which, it held, applied only where the state law *expressly* prohibited the acts complained of (207 U. S. 37).

The doctrine of the *Barney* case was directly repudiated in the case of *Home Telephone Co. v. Los Angeles*, 227 U. S. 278. In that case the plaintiff sued to enjoin

the enforcement of a rate fixing ordinance on the ground that it was contrary to the Fourteenth Amendment. Jurisdiction depended on the federal question thus raised. The defendant city and its officers claimed that the ordinance, if contrary to the Fourteenth Amendment, was *ipso facto* contrary to similar provisions of the state constitution; that there was, therefore, no *authorized* state action shown by the plaintiff's bill to raise a federal question. The court held that this position was untenable. The whole opinion bears so directly upon the contentions made by petitioners that it is almost impossible to single out the most apt passages. We, therefore, respectfully refer the court to the opinion, quoting only the comments of this court expresly dealing with the *Barney* case.

The court said (227 U. S. 294):

> "Much reliance is placed upon the decisions in *Barney v. New York*, 193 U. S. 430, and *Memphis v. Telephone Co.*, 218 U. S. 624. The latter we at once put out of view with the statement that on its face the question involved was one of pleading and in no sense of substantive Federal power. As to the other—the *Barney* case—it might suffice to say, as we have already pointed out, it was considered in the *Raymond* case and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of *Ex parte Young*, it is now so distinguished or qualified as not to be here authoritative or even persuasive. But on the face of the *Barney* case, it is to be observed that however much room there may be for the contention that the facts in that case justified a different conclusion, as the doctrine which we have stated in this case was plainly recognized in the *Barney* case and the decision there rendered proceeded upon the hypothesis that the facts presented took the case out of the established rule, there is no ground for saying that that case is authority for overruling the settled doctrine which, abstractly at

least, it recognized. If there were room for such conclusion in view of what we have said it would be our plain duty to qualify and restrict the *Barney* case in so far as it might be found to conflict with the rule here applied."

With reference to the *Barney* case, the Circuit Court of Appeals said (Tr. pp. 49-50):

"Respondents cite Barney v. New York, etc., 193 U. S. 430, as supporting the argument that all possible remedies under the state law must be exhausted before plaintiffs are entitled to relief in the federal courts. But the force of the Barney case has been greatly weakened by the discussion in Home Telephone Company v. County of Los Angeles, 227 U. S. 278, where there was no diversity of citizenship alleged. The Telephone Company sued to enjoin the enforcement of a rate fixing ordinance on the ground that the ordinance was contrary to the Fourteenth Amendment. Defendant answered that the ordinance, if contrary to the Fourteenth Amendment, was contrary to similar provisions of the state Constitution, and that the Telephone Company must proceed under the state law. The Court, speaking through Chief Justice White, said: 'That is to say, the theory of the Amendment is that where an officer or other representative of a state in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.' The Barney case, supra, was expressly held to have been so distinguished or qualified by the Raymond case, supra, as not to be even persuasive in the argument that the federal court will not interfere merely because of a contention that it is the duty of the plaintiff to exhaust all possible remedies under the state law before he is entitled to relief in the federal court. Other cases might be cited, but those

selected are authority for holding that a federal question is presented."

The Circuit Court of Appeals, we submit, was right in holding that the *Barney* case is no longer an authority on the point to which petitioners cite it. The rule is that, in determining the question of federal jurisdiction to prevent an alleged unconstitutional act by a state officer, "inquiry concerning whether the State has authorized the wrong is irrelevant" (227 U. S. 287). This rule was necessarily implied in the *Raymond* case (207 U. S. 20) and in *Siler, Commissioner, et al. v. Louisville & Nashville R. Co.*, 213 U. S. 175, was definitely stated in the *Home Telephone* case, and has since been repeatedly followed. See:

Fidelity & Deposit Co. v. Tafoya, Corporation Commissioner, et al., 270 U. S. 426, 434;

Chicago etc. R. Co. v. Kendall, Governor, et al., 266 U. S. 94, 97-98;

Wilson v. Illinois Southern R. Co., 263 U. S. 574;

Greene, Auditor, v. Louisville Interurban R. Co., 244 U. S. 499;

Louisville & Nashville R. Co. v. Greene, Auditor, et al., 244 U. S. 522;

Cuyahoga Power Co. v. City of Akron, 240 U. S. 462, 464;

Union Light etc. Co. v. Railroad Commission of Kentucky, 17 F. (2d) 143, 146;

City of Dayton v. City R. Co. (6th C. C. A.), 16 F. (2d) 401, 404-405;

Portland R. etc. Co. v. City of Portland, 210 Fed. 667, 669;

Louisville & N. R. Co. v. Bosworth, Auditor, et al., 209 Fed. 380, 450.

Third: Jurisdiction established by a federal question extends to the whole case, including questions of state law.

The foregoing considerations show, we submit, that this is a proper case for federal jurisdiction. The jurisdiction so established extends to the whole case and the Circuit Court of Appeals was right in reviewing and determining the questions presented with respect to the state constitutional and statutory provisions involved. On this point we quote the following brief extract from *Greene, Auditor et al. v. Louisville & Interurban R. Co.*, 244 U. S. 499. In that case, after pointing out that the District Court had jurisdiction because a federal question was raised by the bill, the court said (p. 508):

> "This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all. *Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191; *Ohio Tax Cases*, 232 U. S. 576, 586."

To the same effect are:

Bohler, Tax Collector et al. v. Callaway, 267 U. S. 479, 489;

Chicago etc. R. Co. v. Kendall, Governor, et al., 266 U. S. 94, 97, 98;

Louisiana Public Service Commission v. Morgan's etc. Steamship Co., 264 U. S. 393, 395;

Davis, et al., v. Wallace, et al., 257 U. S. 478, 482;

Camp v. Boyd, 229 U. S. 530, 551-552;

Siler, et al., Commissioners, v. Louisville etc. R. Co., 213 U. S. 175, 1901-19;

Ex parte Young, 209 U. S. 123.

Fourth: The District Court could not, in its discretion, refuse jurisdiction.

It is evident from the opinion of the trial court (Tr. pp. 31-32) that it believed that it had jurisdiction. This jurisdiction, for reasons of policy, it decided not to exercise. The court said (Tr. pp. 31, 32):

> "I have reached the conclusion that I cannot entertain the suit. This conclusion is arrived at somewhat reluctantly, because to me the merits seem so plain.
>
> * * * * * * * *
>
> It seems to me of the utmost importance to all concerned, including (fol. 51) the American people, that the proper correlation of the Courts of State and Nation is of greater importance than any direct issue here involved. I feel that this Court might take jurisdiction, but I am not persuaded that it would be error not to do so. For that reason, I believe the matter should be left to the Courts of the State of California."

Petitioners, in effect, take the same position as the District Judge in their repeated arguments that the decision of matters of state law in this case should be left to the state courts. The Circuit Court of Appeals held, however, and, we submit, correctly, that this position is untenable. When jurisdiction attaches it extends to all questions in the case, including questions of state law (supra, p. 115). Acceptance of jurisdiction is not a matter of discretion with the federal courts. If jurisdiction is properly invoked, it must be exercised. So in *Cohens v. Virginia*, 6 Wheat. (19 U. S.) 264, the court said (p. 404):

> "It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that

> it must take jurisdiction, if it should. • • • We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

The fact that questions of state or local importance are involved makes no difference. In *Wilcox, et al., Public Service Commissioners of New York, v. Consolidated Gas Co.*, 212 U. S. 19, a suit to enjoin the enforcement of rate fixing statutes and orders, where jurisdiction, as in this case, rested on a federal question, this court said (pp. 39-40):

> "At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel for the appellants, the Public Service Commission, in their brief in this court. They assume to criticise that court for taking jurisdiction of this case, as precipitate, *as if it were a question of discretion or comity, whether or not the court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (Cohens v. Virginia*, 6 Wheat. 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a Federal Court. *The right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied*" (italics ours).

To the same effect are:

Railroad Commission of Minnesota v. Duluth St. R. Co., 273 U. S. 625, 628;

Kline, et al., as the Board of Improvement, v. Burke Construction Co., 260 U. S. 226, 234;

McClellan v. Carland, 217 U. S. 268, 281;

Ex parte Young, 209 U. S. 123, 142-143;

Chicot County v. Sherwood, 148 U. S. 529, 534;

Hyde v. Stone, 20 How. (61 U. S.) 170, 175.

V.

RESPONDENTS HAVE NO ADEQUATE REMEDY AT LAW AND ARE ENTITLED TO AN INJUNCTION.

The Circuit Court of Appeals stated three distinct grounds why respondents have no adequate remedy at law for the threatened action of petitioners and are, therefore, entitled to sue in equity (Tr. pp. 50-53); first, that any possible right of respondents to maintain an action under the state law to recover the tax after payment is extremely doubtful and therefore inadequate; second, that, even if they had such right of action, they could not recover any interest prior to judgment, and third, that even if they had such right of action there would necessarily be a multiplicity of suits because the action would have to be brought not only against the county, but also against the sixteen municipalities, to which the county would distribute parts of the tax.

First: Any possible right of respondents under the state law to pay the tax in suit and, as lessees of the "talking sets", to maintain an action at law to recover it is too doubtful to be adequate.

Petitioners claim that respondents have an adequate remedy at law by paying the tax and bringing an action to recover it under either section 3819 or section 3804 of the Political Code of California. We submit that respondents, being lessees and not owners of the "taking sets", have no remedy under either section.

Section 3819 (omitting the last paragraph, which deals with taxes, which may have been paid into the state treasury) reads as follows:

> "PAYMENT OF TAXES UNDER PROTEST. ACTION WITHIN SIX MONTHS. AMOUNT DUE COUNTY FROM STATE. At any time after the assessment-book has been received by the tax-collector, and the taxes have become payable, *the owner* of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax-collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded and when so paid under protest, the payment shall in no case be regarded as voluntary payment.
>
> ACTION TO RECOVER TAX. *And such owner* may at any time within six months after such payment bring an action against the county, in the superior court, to recover back the tax so paid under protest; provided, however, that no recovery shall be had in any such action unless such action be brought by such *owner* or his guardian, or in case of his or her death, by his or her executor or administrator; and provided, further, that no recovery shall be had in such action if the same be brought by an assignee of such owner, or by anyone other than the persons last hereinabove designated. And if it shall be adjudged that the as-

sessment, or the part thereof referred to in the protest, was void on the ground specified in the protest, judgment shall be entered against such county therefor; provided, that no assessment shall be declared void on account of deductions being made for mortgages where part payments have been made and not released upon the record."

This section, which permits no one but the "owner" of assessed property to recover taxes thereon, affords no remedy to respondents, who are not owners but lessees.

In *Warren v. San Francisco*, 150 Cal. 167, 88 Pac. 712, the State Supreme Court, in holding that an abutting lot owner, who had paid an illegal tax on a portion of the street to prevent a sale of that part of the street, to the manifest injury to his own property, had no rights under section 3819, said (150 Cal. 170):

"'Section 3819 of the Political Code has no application. That section provides that the "owner" of any property assessed, who may claim that the assessment is void, may pay his tax under protest, specifying the grounds of the protest; and that when so paid under protest the payment shall not be regarded as voluntary. The plaintiff herein was not the "owner" of the land assessed.'"

Section 3804, we submit, is likewise inapplicable. It provides:

"REFUND OF ERRONEOUSLY COLLECTED TAXES, ETC. IN SCHOOL DISTRICT. VERIFIED CLAIM. ACTION FOR ENFORCEMENT OF CLAIM. Any taxes, penalties or costs thereon heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected, or any taxes heretofore or hereafter paid upon an assessment in excess of the actual cash value of the property so assessed by reason of a clerical error of the assessor as to the excess in such cases, or any taxes heretofore or hereafter paid upon an erroneous

assessment of improvements on real estate not in fact in existence, when said taxes became a lien, may, by order of the board of supervisors, be refunded by the county treasurer. Whenever any payment shall have been made to the state treasurer by the county treasurer as provided by section three thousand eight hundred sixty-five and section three thousand eight hundred sixty-six of this code, and it shall afterward appear to the satisfaction of the board of supervisors that a portion of the money so paid should be refunded as herein provided, said board of supervisors may refund such portion of the said taxes, penalties and costs so paid to the state treasurer, to the person paying the same or to his guardian, or in case of his death, to his executor or administrator, out of the general fund, and upon the rendering of the report required by section three thousand eight hundred sixty-eight of this code the auditor shall certify to the controller in such form as the controller may prescribe, all amounts so refunded, and in the next settlement of the county treasurer with the state, the controller, if satisfied of the legality of such refunding by the said board, shall give such treasurer credit for the state's portion of the amounts so refunded, as prescribed in section three thousand eight hundred seventy-one of this code.

In school districts. When the taxes, penalties and costs hereinbefore referred to are levied in behalf of any school district or any municipal or other public corporation, and collected by the officers of the county, the same may be refunded upon order of the board of supervisors, and the county treasurer shall pay the amount to be refunded out of any money in his possession belonging to the appropriate fund of such school district or municipal or other public corporation * * *."

Although section 3804 simply enumerates the circumstances under which a taxpayer may apply to the board of supervisors for a refund of taxes and does not provide

for an action at law after an adverse ruling, the state courts have in several instances entertained such actions.

There is, however, no decision of the state courts permitting a lessee to pay taxes assessed against the owner and to maintain an action under section 3804 to recover them. In the cases cited by petitioners in support of a contrary claim (Petitioners' Br. p. 73), the assessments had been separately made upon a leasehold or other qualified interest *as such;* an oil lease, with a right to take a part of the substance of the land itself, in the case of *Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 99 Pac. 483; a leasehold interest for a long term of years in tide lands owned by the state, the property being exempt from taxation to the state as owner, in *San Pedro etc. R. R. Co. v. City of Los Angeles*, 180 Cal. 18, 179 Pac. 383; the interest of a purchaser of unpatented lieu lands in *Slade v. County of Butte*, 14 Cal. App. 453, 112 Pac. 485. In each of these cases the suit to recover the taxes paid under protest was brought by the plaintiff as the owner of the qualified interest which had been assessed.

Petitioners' argument that respondents, as lessees of the "talking sets", could pay the tax and sue under section 3804 to recover it is directly contrary to their argument (Br. pp. 70-72) that that section affords a "concurrent remedy" with section 3819 (under which only an "owner" can sue) and to their argument that as a general principle of taxation in California the owner of property is solely responsible for taxes (Petitioners' Br. pp. 143-144). We contend that this argument is wholly unsound (supra, pp. 52-55; infra, p. 134), but petitioners seriously make it and argue that respondents are in no

way liable for the tax; in other words, that they are mere interlopers without any right to pay it. How, then, under petitioners' contention, could respondents maintain an action under section 3804? We submit that they cannot justly be compelled to take the risk as to which of petitioners' conflicting theories the state court may adopt (*Railroad Commission of Minnesota v. Duluth St. R. Co.*, 273 U. S. 625, 628). A doubtful remedy is not adequate (Judicial Code, Sec. 267, U. S. C. 28:384, Comp. Stats. Sec. 1244).

Thus in *Davis v. Wakelee*, 156 U. S. 680, this court said:

> "It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit * * *. Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

In *Union Pacific R. Co. v. County Commissioners of Weld County*, 247 U. S. 282, a suit to enjoin the collection of county taxes, the county claimed that a state statute afforded an adequate remedy at law. In overruling this contention the court said (pp. 286-287):

> "Counsel differ widely respecting the effect of this statute on the earlier section (Sec. 5750, Rev. Stats. 1908) and on the substantive right given by it to have an erroneous or illegal tax refunded.
> * * * * * * * * *
> An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. The question is purely one of state law, and, so far as we are advised, the Supreme Court of the State has not passed on or considered it. A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In

these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, the situation is not one in which cognizance of the present suit properly can be declined."

See also:

Bohler, Tax Collector, et al., v. Callaway, 267 U. S. 479, 488 ("If the remedy by law is doubtful, equitable relief may be had");

Wilson, Tax Collector, v. Illinois Southern R. Co., 263 U. S. 574, 577 ("• • • The adequacy of a remedy at law must be clear");

Atlantic Coast Line v. Daughton, Commissioner etc., 262 U. S. 413, 426 ("holding that where state statutes claimed by defendants to afford an adequate remedy at law had not been construed by the State Supreme Court, the legal remedy was doubtful and therefore inadequate");

Dawson, Attorney General, v. Kentucky Distilleries Co., 255 U. S. 288, 296 ("It is well settled that 'if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit' ");

Wallace v. Hines, 253 U. S. 66, 68 ("• • • we ought not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought").

Second: Even if under the state law respondents could pay the tax in dispute and bring an action to recover it, they could not recover interest prior to judgment.

It is settled in California that a plaintiff who recovers wrongfully collected taxes cannot in any sort of proceeding recover interest prior to judgment (*Engebretson v. City of San Diego*, 185 Cal. 475, 479-480, 197 Pac. 651; *Spencer v. City of Los Angeles*, 180 Cal. 103, 115, 179 Pac.

163; *Miller v. County of Kern*, 150 Cal. 797, 798, 799, 90 Pac. 119; *Savings and Loan Society v. San Francisco*, 131 Cal. 356, 363, 63 Pac. 665; *United Taxpayers v. San Francisco*, 55 Cal. App. 239, 243, 203 Pac. 120; *Southwest Land Co. v. County of Los Angeles*, 46 Cal. App. 9, 15, 188 Pac. 575).

The Circuit Court of Appeals held that recovery *without interest* of taxes paid under protest is not an adequate remedy (Tr. pp. 52-53). This conclusion is supported by at least three other cases. We know of no case to the contrary, and petitioners have cited none.

In *Birch v. Board of Supervisors of Orange County*, 191 Cal. 235, 215 Pac. 903, the trial court in certiorari proceedings had quashed an order of the supervisors increasing an assessment upon property of the plaintiff. The writ of certiorari, like that of injunction, is, of course, not issued where there is an adequate remedy at law (Code of Civil Procedure, Sec. 1068). In affirming the judgment the State Supreme Court said (p. 237):

> "The appellants contend that the plaintiffs have a plain, speedy, and adequate remedy by paying the tax and suing to recover the same under the provisions of section 3819 of the Political Code. It is true that the district court of appeal, in *Richard v. Council of Santa Barbara*, 49 Cal. App. 58 (192 Pac. 726) declined to set aside an assessment on the ground that the property owners had a plain, speedy, and adequate remedy by paying the tax and bringing suit to recover the same, but the plaintiffs in this case point out that under our decision in *Miller v. County of Kern*, 150 Cal. 797 (90 Pac. 119), *the petitioner is not entitled to recover interest upon the increased tax, which increase is about four thousand five hundred dollars, and for this reason that the remedy by suit to recover the tax is not adequate*" (italics ours).

In *Proctor & Gamble Distributing Co. v. Sherman, Attorney General, et al.* (S. D. N. Y.), 2 F. (2d) 165, the plaintiff sued to enjoin the Attorney General of New York and the members of the State Tax Commission from collecting certain corporation taxes, on the ground that the defendants, in computing the taxes, had ignored the distinct entities of the plaintiff and its subsidiaries. The defendants claimed that the plaintiff had an adequate remedy at law under the New York statute by paying the tax and suing to recover it. The court held that, inasmuch as this statute did not allow interest, the remedy under it was not adequate. The court said (p. 166):

> "But, *quite independently of such doubts, the relief is inadequate because of the express refusal to allow interest.* It is no answer to say that interest is not allowed against the sovereign (citing cases). The adequacy of the requisite legal remedy cannot be measured by the remedies one has against a person who is exempt from all process. If that were the test, the principal itself might be confiscated. While I have been referred to no decision on the point, *it seems to me plain that it is not an adequate remedy after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all.* Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong" (italics ours).

In *Southern Ry. Co. v. Query, et al., South Carolina Tax Commission*, 21 F. (2d) 333, decided since the decision of

the Circuit Court of Appeals, the same question was before a court of three judges, convened under section 266 of the Judicial Code (U. S. C. 28:380, Comp. Stats. Sec. 1243), to consider an application by the plaintiff for an injunction against the Tax Commission restraining the collection of additional income taxes. Plaintiff claimed that the legal remedy was inadequate, for the reason, among others, that the South Carolina law did not permit recovery of interest on taxes paid under protest. The court decided that the state law did permit the recovery of such interest, but nevertheless said (p. 342):

> "The plaintiff further insists that the provision contained in section 32 is inadequate, because it does not in express terms provide for interest. In a number of decisions by the Supreme Court of the United States, it was held that, where state statutes made a provision by which the aggrieved taxpayer could recover at law the taxes illegally exacted, such would be a complete remedy, and equity would not take jurisdiction. Union Pacific R. R. Co. v. Weld County, 247 U. S. 282, 285, 38 S. Ct. 510, 62 L. Ed. 1110, and cases there cited; Singer Sewing Machine v. Benedict, 229 U. S. 481, 33 S. Ct. 942, 57 L. Ed. 1288, and cases there cited. In the statutes in question in these cases there was apparently no express provision for the repayment of interest on the amount illegally exacted. But it may be said that the point of interest was not directly presented in those cases, and therefore the decisions in that respect are not conclusive, and to this view we are inclined to agree.
>
> Whatever may be said as to those views which were entertained in remote times respecting interest, considering such exactions in all cases usurious, or illegal, if not positively sinful, yet in modern times such archaic notions have long since been abandoned. Money is now a proper subject of hire, and the habits and customs of the people and modern law all concur in recognizing that interest is a proper means

> of compensation for the use of money lent or wrongfully detained. A sum of money to-day is worth more than exactly the same sum next month or next year, and we cannot ignore the fact that to take a man's money to-day and return him exactly the same sum at a later period does not afford full compensation for the wrong that has been done him. We think, therefore, that a remedy which does not provide for a reasonable amount of interest for the time of its detention would not be a complete remedy at law, and, if in this case we thought that the plaintiff would not be entitled in such action at law to recover interest, we would retain this bill."

The principle that interest on money due is an essential part of just compensation has been recognized by this court. In *Miller v. Robertson*, 266 U. S. 243, a suit by a seller against the Alien Property Custodian for breach of a contract of sale by individual German defendants, the court said (p. 258):

> "In this case, at least as early as June 29, 1916, the date of demand, the seller was entitled to have from the buyers the difference between the sum which it would have received prior to that date, if the buyers had kept their contract, and the amount it received on resale. Payment in 1924 or later of that sum is not full compensation."

In the case at bar the assessment exceeds $50,000 (Tr. p. 4). Judging by ordinary experience, it is safe to say that it would take a period perhaps of years to conclude a suit at law to recover the tax if paid. Interest during that time would be a substantial amount. In the meanwhile many if not all of the other 57 counties in the state might follow the example of Los Angeles County and attempt to tax leased "talking sets" used by respondent, The Pacific Telephone and Telegraph Company.

Upon such taxes the company would be penalized many thousands of dollars in interest, even if it were ultimately held at law that the taxes were unlawful.

A remedy at law, to be adequate, must be as effective and complete as the remedy in equity (Judicial Code, Sec. 267, U. S. C. 28:384, Comp. Stats. Sec. 1244; *Boyce v. Grundy*, 3 Pet. 210; *Tyler v. Savage*, 143 U. S. 79, 95; *Williams v. Neely* (8th C. C. A.), 134 Fed. 1, 10). In tax cases such remedy must allow the taxpayer, upon payment of the tax, to contest its validity without incurring unreasonable penalties and forfeitures (*Bank of Kentucky v. Stone*, 88 Fed. 383, 390, 391, affirmed 174 U. S. 409; *Wallace v. Hines*, 253 U. S. 66, 67; see also *Ex parte Young*, 209 U. S. 123). Such a remedy is, we submit, not afforded by an action at law in which interest is not allowed.

Petitioners go outside the record to say that respondents, by their present counsel, have brought suits against Los Angeles County under section 3804. Respondents have brought no suit against the county, except as owners under section 3819 of the Political Code, which, as already shown, is not available to them in this case.

Third: The county, if it collects the tax in dispute, will collect parts of it for sixteen separate municipalities. Respondents could recover the tax at law, if at all, only in a multiplicity of suits.

The defendant county is trying to collect substantial parts of the tax in dispute for the benefit of sixteen municipalities.*

* The tax bills in suit, some fifty in number, were received in evidence as Plaintiff's Exhibit 3 (Tr. p. 34).

All these municipalities (Tr. pp. 12-14) have availed themselves of the privileges conferred by the Act approved March 27, 1895, as amended (Deering's General Laws 1923, Vol. 2, p. 3531; Cal. Stats. 1895, p. 219, as amended) to have the County of Los Angeles collect their taxes for them. This act provides for the levy and collection of city taxes by county officials, where the legislative body of the municipal corporation so elects.

Under section 4 of this act, each municipality fixes its own tax rate. Section 5 provides that municipal taxes shall be collected at the same time and in the same manner as county taxes and that, when collected, they shall be paid to the treasurer of the municipal corporation to which they belong "under the general requirements and penalties provided by law for the settlement of other taxes". The general law requires the tax collector to pay all taxes in his hands to the county treasurer on the first Monday of each month (Pol. Code, Secs. 3753, 4126); and further, to make such payment "at least once a month, and oftener, in his discretion" (Pol. Code, Sec. 4126).

There is no statutory provision, other than section 3819 of the Political Code, making a county liable for taxes illegally or improperly collected for municipalities. That section, as shown, is not available to respondents as lessees. Section 3804 of the Political Code, as originally passed, made no reference to this subject and covered only refunds of state and county taxes. Under it the Supreme Court of the state decided that a taxpayer could not recover from the county taxes wrongfully collected by the county for and paid over to a school district (*Elberg v. County of San Luis Obispo*, 112 Cal. 316,

41 Pac. 475, 44 Pac. 572; *Pacific Mutual Life Ins. Co. v. County of San Diego*, 112 Cal. 314, 41 Pac. 423).

By amendments in 1901 (Stats. 1901, p. 648) and in 1907 (Stats. 1907, p. 755), the provision was added to section 3804 that school district or other municipal taxes might be refunded "out of any money * * * belonging to the appropriate fund of such school district or municipal or other public corporation".

How this amendment bears out petitioners' statement that the supervisors can refund "moneys collected as taxes on behalf of such other bodies in exactly the same manner as those on behalf of the county" (Petitioners' Br. p. 90), we confess we cannot understand. Whether the county would at any time have money available for tax refunds—and it is only from such money that refunds can be made—is a highly uncertain matter. The law requires that taxes collected for municipalities be paid to them monthly or oftener (Political Code, Secs. 3753, 4126, supra). *Moreover, under section 1 of the Act of March 27, 1895, any municipality may at any time withdraw from the arrangement whereby the county collects its taxes.*

Petitioners themselves say that the county's control of municipal money for refund purposes lasts "so long as the county retains possession of the money" (Petitioners' Br. pp. 90-91). The county, as above shown, cannot possibly retain such money during the period necessary to conclude an action at law over the tax in suit.

Furthermore, section 6 of the statute allows the county a percentage of the taxes which are collected for the municipalities for the cost of collecting them. There is

no provision of law for the repayment of such percentage of taxes illegally collected.

The Circuit Court of Appeals held, and we submit, correctly, that (Tr. p. 52):

> "if plaintiffs should pay the taxes in suit there would seem to be no certain way of obtaining complete refund except by suits against the county and the various municipalities. This would require plaintiffs to bring many suits, and in the event of recovery there would be no provision by which plaintiffs could recover the sums allowed the counties for the costs of collection."

The foregoing circumstances, we submit, show that any possible remedy at law to recover the tax in suit after payment would involve a multiplicity of suits, and is not adequate. In *Raymond, Treasurer, et al. v. Chicago Union Traction Co.*, 207 U. S. 20, the court said (pp. 38-40):

> "Finally it is objected that the appellee had a complete and adequate remedy at law by paying the amount of the warrant, and then suing the collector to recover the same back as money paid under duress, although upon a void warrant.
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> * * * * * * *
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> In the case at bar it is averred that it is the duty of the collector, having received the money on his warrant, to pay the sum so received in the proportions designated in his tax books to the city treasurer of the city of Chicago, the county treasurer of the county of Cook, the treasurer of the sanitary district, and other officers and authorities entitled to receive the same, and if the plaintiff instituted suit to recover back the taxes so paid to the town or county collector he would be obliged to bring separate suits against each one of the several taxing bodies receiving its proportionate share of the tax, thereby necessitating a multiplicity of suits, and the proportion of

the tax which would go to the State of Illinois could not be collected back by any legal proceeding whatsoever; and if repayment could be compelled from the city of Chicago and other taxing bodies, such repayment would not cover the cost, including commissions deducted for the collection of the tax, and in that way it was averred that the appellee would be subjected to great and irreparable injury, for which there was not a complete or adequate remedy at law. There was also the allegation, already referrd to in the foregoing statement, that if compelled to pay this enormous tax it would be rendered insolvent. We think all these allegations combined take the case out of the class where relief is prayed for, founded simply upon the unconstitutionality of the law under which the tax is levied, or upon the illegality for any other reason, of the tax itself, and bring the case within the jurisdiction of a court of equity."

In each of the following cases it was held that a taxpayer may enjoin collection of an illegal tax if, after payment, it would be distributed among several municipalities:

Wilson, County Collector, v. Illinois Southern R. Co., 263 U. S. 574, 576 577;

Waggoner, et al. v. Wichita County, 298 Fed. 818 (Aff. 5th C. C. A., 3 F. (2d) 962, Aff. 273 U. S. 113);

Waggoner v. Baylor County, 298 Fed. 822;

Bank of Arizona v. Howe, Commissioner, et al., 293 Fed. 600, 605;

Standard Oil Co. v. Howe, Commissioner, et al., 257 Fed. 481, 487;

Mayor etc. of Jersey City v. Central R. Co. (3rd C. C. A.), 212 Fed. 76, 82.

Fourth: The collection of the tax in dispute would work substantial injury to respondents and respondents are proper parties plaintiff in equity (Answering Petitioners' Br. pp. 103-104).

Petitioners' argument that respondents cannot maintain this suit and that the only proper plaintiff is the American Telephone and Telegraph Company, owner of the "talking sets", is, we submit, clearly untenable. If the "talking sets" were sold in satisfaction of the tax, the sale would carry respondents' leasehold interest. It is alleged and admitted that the seizure of the "talking sets" would disrupt respondents' systems by destroying the utility of all the instruments in Los Angeles County, of which the "talking sets" are integral parts (Tr. pp. 9, 17). Respondents' leasehold interest in the "talking sets" and their right to conduct the business in which they are engaged are valuable property rights, which manifestly may be protected in equity if no adequate legal remedy is available (see *Terrace v. Thompson, Attorney General, et al.*, 263 U. S. 197; *Truax v. Raich*, 239 U. S. 33).

A similar question has been presented in the several states where property leased by public utilities is not subject to local taxation against the owner because of taxes paid by the operating utility. In cases where a local assessment has nevertheless been made against the owner, the lessee has been allowed to contest the tax (*Merrill Railway etc. Co. v. City of Merrill*, 119 Wis. 249, 96 N. W. 686; *City of Superior v. Allouez Bay Dock Co.*, 166 Wis. 76, 164 N. W. 362; *Wisconsin Electric Power Co. v. Town of Lake*, 186 Wis. 199, 202 N. W. 195; *People ex rel. Abt, County Collector, v. Wiggins Ferry Co.*, 257 Ill. 452, 100 N. E. 956; *People v. Illinois Northern R. Co.*, 248 Ill. 532, 94 N. E. 37; supra, pp. 65-69).

Manifestly, such lessee is entitled to contest the tax in equity if the state statutes afford no remedy at law.

CONCLUSION.

Petitioners invoke the "law of the land". This court has declared that the "law of the land" requires that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the bottom of all our civil and political institutions" (*Hebert v. Louisiana*, 272 U. S. 312, 316, 317). In submitting this case for decision we, too, rely on the "law of the land". For, besides the fact, which we believe we have shown, that the tax in question was not contemplated by the framers of the state constitutional and statutory provisions on which petitioners rely for its enforcement and is not warranted by the terms of these provisions themselves, fundamental principles of justice, we submit, compel the conclusion that the double tax burden here sought to be enforced is unjust and unlawful and is not to be sanctioned.

It is respectfully submitted that the decree of the Circuit Court of Appeals is right and should be affirmed.

Dated, San Francisco,
November 25, 1927.

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(APPENDICES I AND II FOLLOW.)